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Through Fault of Their Own—Applying Bonner Mall's Extraordinary Circumstances Test to Heightened Standard of Review Clauses

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"THROUGH FAULT OF THEIR OWN"—APPLYING *BONNER MALL*'S EXTRAORDINARY CIRCUMSTANCES TEST TO HEIGHTENED STANDARD OF REVIEW CLAUSES

Abstract: Since 2001, the federal circuit courts of appeals have remained split on the propriety of enforcing heightened standard of review clauses contained in arbitration agreements governed by the Federal Arbitration Act (the "FAA"). After reviewing the history of arbitral awards and the text, structure, and legislative history of the FAA as well as the U.S. Supreme Court's interpretation of the FAA, this Note proposes a resolution to the heightened-review circuit split, which is consistent with the FAA's pro-arbitration policy and U.S. Supreme Court precedent. This Note's proposed resolution would require courts to reject heightened-review clauses through application of the extraordinary circumstances test that the U.S. Supreme Court developed in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*. This Note argues that the adoption of *Bonner Mall*'s extraordinary circumstances test will protect judicial integrity and preserve arbitration as a viable litigation alternative for the entire legal community.

INTRODUCTION

In 1986, the Kyocera Corporation, citing payment and shipping disputes, desired to restructure a multi-million dollar disk drive production contract with Prudential-Bache Trade Services, Inc.[1] Thereafter, the parties decided to continue their relationship and to settle any future disputes through final and binding arbitration.[2] Under the

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[1] *See* Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 989–90 (9th Cir. 2003) (en banc).

[2] *See id.* at 990 & nn.1–2, 991. In *Kyocera*, the parties conceded their intent to have an arbitrator resolve contractual disputes. *Id.* at 990 n.2. Although the parties' agreement did not state specifically that the decision of the arbitrator was final and binding, this intent is coextensive with the decision to arbitrate. *See id.* Indeed, a comprehensive treatise on commercial arbitration states that "[a]rbitration . . . involves a final determination of disputes. . . . [It] is based on a voluntary agreement of the parties, made before the arbitration . . . is instituted, to submit a dispute for the binding decision of the arbitrator." 1 LARRY E. EDMONDSON, DOMKE ON COMMERCIAL ARBITRATION §§ 1:1, 1:3 (3d ed. 2003) (citation omitted). When parties opt for arbitration, they voluntarily forgo resolving disputes through mediation or conciliation, the results of which are not binding. *See id.* § 1:3.

Federal Arbitration Act (the "FAA"), a federal district court can vacate or nullify arbitration awards only for severe procedural irregularities, such as fraud or lack of a fair hearing in the arbitral proceeding.[3] Because vacatur review under the FAA is an extremely narrow inquiry, the parties agreed to include a heightened standard of review clause in their agreement.[4] The clause directed a federal district court to conduct an extensive factual and legal review of an arbitral award upon either party's motion for vacatur.[5] Following a subsequent arbitration in which it was ordered to pay more than $200 million in damages, Kyocera invoked the heightened-review clause.[6]

After sixteen years of protracted litigation, in 2003, in *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, the Ninth Circuit Court of Appeals, sitting en banc, held unanimously that enforcing the heightened-review clause was unconstitutional because doing so would subvert Congress's plenary power to establish the procedures of the federal courts.[7] This was the latest and most definitive salvo in a circuit split on the enforceability of heightened-review clauses that has persisted since 2001.[8]

Beginning in the late twentieth century, arbitration became an increasingly prevalent form of alternative dispute resolution in the

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[3] *See* 9 U.S.C. §§ 9–10 (2000); *see also Kyocera*, 341 F.3d at 997–98 (setting forth section 10 vacatur grounds and stating, "[T]hese grounds afford an extremely limited review authority, a limitation that is designed to preserve due process but not to permit unnecessary public intrusion into private arbitration procedures."); Gupta v. Cisco Sys., Inc., 274 F.3d 1, 3 (1st Cir. 2001) (concluding that judicial review of arbitral award is among narrowest under law). For a brief summary of section 10 of the FAA, see *infra* notes 69–71 and accompanying text.

[4] *See Kyocera*, 341 F.3d at 991; *see also, e.g.*, Katz v. Feinberg, 167 F. Supp. 2d 556, 563 (S.D.N.Y. 2001) (reasoning that vacatur review under section 10 is extremely limited because extensive review would subvert the "twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.") (quoting Dirussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 827 (2d Cir. 1997)).

[5] *See Kyocera*, 341 F.3d at 990–91, 994.

[6] *Id.* at 990–91.

[7] *See id.* at 991–94.

[8] *See id.* at 998–1000. The circuit split on the propriety of heightened-review clauses has attracted a considerable amount of scholarly debate. *See, e.g.*, Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1244, 1250 (2000) (describing circuit split and proposing resolution); Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171, 174–79 (2003) (reviewing pro- and anti-heightened-review precedents); Eric van Ginkel, *Reframing the Dilemma of Contractually Expanded Judicial Review: Arbitral Appeal vs. Vacatur*, 3 PEPP. DISP. RESOL. L.J. 157, 160, 161, 178–79 n.113 (2003) (citing previous studies and reasoning that circuit split involves proper conception of arbitral finality).

commercial, employment, and consumer contexts.[9] Parties were attracted to arbitration because they could obtain a final and binding judgment without incurring the costs, delays, and publicity inherent in litigation.[10] These benefits were counterbalanced, however, by the FAA and the precedents interpreting it, which virtually assured that courts would treat arbitral awards as final judgments.[11] Courts had long recognized that finality was the crux of the arbitral bargain because if awards were precatory, then arbitration would be a mere prelude to, and not a substitute for, litigation.[12] Although careful post hoc judicial scrutiny might render the correct result in a particular dispute, this unitary benefit was substantially outweighed by the encouragement of vexatious litigation, which would tend to discourage parties' future utilization of arbitration.[13]

Accordingly, vacatur under the FAA was rare.[14] In response to the unwillingness of courts to overturn the results of their preferred method of dispute resolution, parties like Kyocera and Prudential sought to derive arbitral benefits and guard against the possibility of hugely disproportionate or legally erroneous awards with height-

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[9] *See, e.g.*, Goldman, *supra* note 8, at 174, 199.

[10] *Id.* at 171.

[11] *See, e.g.*, First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942, 943 (1995). In *First Options of Chicago, Inc. v. Kaplan*, the U.S. Supreme Court stated the following:

> [A] party who has *not* agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute. . . . But, where the party *has* agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will only set that decision aside in very unusual circumstances.

Id. at 942 (emphasis added). The Court cited section 10 of the FAA and the "manifest disregard for the law" standard as examples of very unusual circumstances. *Id.* The grounds for vacating an arbitral award pursuant to section 10 of the FAA are similar to those governing the vacatur of final judgments. *See* Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 n.8 (11th Cir. 1988); *see also* van Ginkel, *supra* note 8, at 189 (noting that vacatur grounds under section 10 of FAA and Rule 60(b) of Federal Rules of Civil Procedure are similar). *Compare* 9 U.S.C. § 10 (2000) (stating that award may be vacated for fraud, lack of fair hearing, or arbitrator misconduct), *with* FED. R. CIV. P. 60(b) (permitting vacatur for fraud, lack of fair hearing, or in the interest of justice).

[12] *See* Burchell v. Marsh, 58 U.S. (17 How.) 344, 349 (1854); *see also* Office of Supply, Gov't of Republic of Korea v. N.Y. Navigation Co., 469 F.2d 377, 379 (2d Cir. 1972) (holding that limited review ensures viability of arbitration as litigation alternative).

[13] *See* Schoch v. Infousa, Inc., 341 F.3d 785, 789 n.3 (8th Cir. 2003) (citing Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1254 (7th Cir. 1994)); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 935, 936 n.7 (10th Cir. 2001); *see also* Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 683 (7th Cir. 1983) (reasoning that under FAA, courts must not encourage practices that increase cost and undermine finality of arbitration).

[14] *See* 4 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 40.1.4 (Supp. 1999).

ened-review clauses.[15] Such devices blended arbitration's informal and inexpensive adjudicatory system with the federal courts' circumspect legal and factual analysis as a security against legally and/or factually erroneous awards.[16]

Prior to 2003, several "pro-heightened-review" circuit courts of appeals enforced heightened-review clauses because the U.S. Supreme Court's FAA precedents declared a pro-arbitration policy, which required enforcing arbitration agreements according to their terms.[17] Conversely, "anti-heightened-review" courts reasoned that the FAA was intended to preserve arbitration as a litigation alternative.[18] Therefore, because heightened-review clauses encouraged litigation, anti-heightened-review courts held that the clauses were incompatible with the FAA's pro-arbitration policy and unenforceable.[19] In contrast to both of these approaches, the *Kyocera* court moved the heightened-review debate away from its preoccupation with the contours of pro-arbitration policy.[20] Focusing on judicial integrity, the Ninth Circuit held that the federal courts simply could not conform their procedures to contractually mandated processes that contravened both the U.S. Constitution and the FAA's text.[21] Thus, heightened-review vacatur requests are currently subject to review under three variant analytical frameworks.[22]

As a result of the heightened-review circuit split, prospective arbitrants engaged in interstate commerce in pro-heightened-review circuits are required to bargain around the heightened-review issue, whereas similarly situated actors in anti-heightened-review circuits are not.[23] In contrast, a standardized framework for analyzing height-

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[15] *See* Goldman, *supra* note 8, at 172–73.

[16] *See id.*

[17] *See, e.g.*, Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 996–97 (5th Cir. 1995). For a review of pro-heightened-review precedents, see *infra* notes 144–164 and accompanying text.

[18] *See, e.g., Bowen*, 254 F.3d at 932, 933, 936. For a review of anti-heightened-review precedents, see *infra* notes 178–199 and accompanying text.

[19] *See id.* at 935, 936 n.7. For a review of *Bowen*, see *infra* notes 178–190 and accompanying text.

[20] *Compare Kyocera*, 341 F.3d at 994 (deciding FAA specifies exclusive grounds for vacating awards), *with Bowen*, 254 F.3d at 933, 935 (concluding that FAA's pro-arbitration policy and U.S. Supreme Court precedents prohibit heightened-review clauses).

[21] *See Kyocera*, 341 F.3d at 994, 1000.

[22] *Compare, e.g., id.* (applying textual/constitutional framework), *and Bowen*, 254 F.3d at 935–37 (utilizing policy approach to support non-enforcement), *with Gateway*, 64 F.3d at 996–97 (using policy approach to support enforcement).

[23] *Compare, e.g., Kyocera*, 341 F.3d at 1000 (concluding that federal courts may not vacate award pursuant to contractual standard), *with* Roadway Package Sys., Inc. v. Kayser,

ened-review requests would lead to predictable results, which would increase both bargaining and judicial efficiency.[24] Moreover, judicial integrity is enhanced when courts apply uniform analytical frameworks consistently.[25]

This Note argues that the extraordinary circumstances test, which applies when parties seek to vacate judicial final judgments equitably, should furnish the proper rubric for reviewing the validity of heightened-review clauses.[26] In 1994, in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, the U.S. Supreme Court applied the extraordinary circumstances test to defeat an attempt to vacate an appellate judgment pursuant to a private settlement agreement.[27] Part I of this Note reviews the history of arbitral awards and the text, structure, and legislative history of the FAA and the precedents interpreting the Act.[28] A review of these materials indicates that the FAA requires courts to enforce arbitral awards as final judgments to maintain the viability of arbitration as a mode of alternative dispute resolution.[29] Part II presents the federal circuit courts of appeals' heightened-review jurisprudence and the Second Circuit Court of Appeals' decision in 2003, in *Hoeft v. MVL Group, Inc.*, which applied *Bonner Mall*'s rationale to strike down a *decreased* standard of review clause.[30] This Part also presents two scholarly proposals for a uniform heightened-review jurisprudence.[31] Because the *Hoeft* court left open the question of whether *Bonner Mall*'s extraordinary circumstances test should apply to *heightened* standard of review clauses, Part III carefully considers the U.S. Supreme Court's holding in *Bonner Mall*.[32] In addition, this Part reviews the Seventh Circuit Court of Appeals' decision in 1983, in *Merit Insurance Co. v. Leatherby Insurance Co.*, in which the court applied a test similar to *Bonner Mall*'s extraordinary circumstances test to defeat a request to vacate an arbitral award pursuant to a contractual procedure.[33]

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257 F.3d 287, 292–93, 296, 297 (3d Cir. 2001) (explaining that pro-heightened-review precedent allows sophisticated parties to bargain around FAA's default vacatur standards).

[24] *See Roadway*, 257 F.3d at 296–97.

[25] *See* U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 26–27 (1994); Hoeft v. MVL Group, Inc., 343 F.3d 57, 65 (2d Cir. 2003).

[26] *See Bonner Mall*, 513 U.S. at 26–29.

[27] *Id.*

[28] *See infra* notes 40–137 and accompanying text.

[29] *See infra* notes 293–324 and accompanying text.

[30] *See infra* notes 138–211 and accompanying text.

[31] *See infra* notes 212–223 and accompanying text.

[32] *See infra* notes 230–243 and accompanying text.

[33] *See infra* notes 245–270 and accompanying text.

Finally, Part IV critically analyzes the pro-heightened-review position and rejects it in favor of the extraordinary circumstances test.[34] After reviewing the history of arbitral awards and the text, structure, and legislative history of the FAA, as well as the U.S. Supreme Court's interpretation of the FAA, Part IV.A concludes that the FAA's protection of arbitral finality is as valuable to the legal community as the final judgments at issue in *Bonner Mall*.[35] Part IV.B then explains the analogy between heightened-review clauses and the contractual vacatur request at issue in *Bonner Mall*.[36] Part IV.C critiques and rejects two prior scholarly attempts to standardize a framework for reviewing the propriety of heightened-review clauses.[37] Unlike these prior attempts, the extraordinary circumstances test is both consistent with U.S. Supreme Court precedent and the FAA's pro-arbitration policy because it protects finality—the primary institutional advantage of arbitration—and concomitantly permits parties to structure their arbitral proceedings as they see fit.[38] Finally, Part IV.D summarizes the foregoing analysis.[39]

I. The Federal Arbitration Act: History, Text, Structure, Legislative History, and Precedent

A. *History: Finality as a Basic Assumption*

To determine which analytical framework should apply to heightened-review vacatur requests, it is essential to develop an understanding of arbitral awards and the FAA.[40] Modern commercial arbitration is an outgrowth of informal, medieval mercantile adjudications.[41] Then, as now, the practice was designed as a litigation avoidance mechanism.[42] Parties choose to arbitrate to avoid the costs and delays inherent in litigation and often to maintain a modicum of privacy over sensitive matters.[43] Like traditional litigation, arbitration ul-

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[34] For a summary of Part IV's conclusions, see *infra* notes 364–379 and accompanying text.

[35] *See infra* notes 281–324 and accompanying text.

[36] *See infra* notes 325–342 and accompanying text.

[37] *See infra* notes 343–363 and accompanying text.

[38] *See infra* notes 348–363 and accompanying text.

[39] *See infra* notes 364–379 and accompanying text.

[40] *Cf.* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 948 (1995) (holding, in FAA context, that standards of review should be crafted in accordance with institutional advantages).

[41] Cole, *supra* note 8, at 1235.

[42] *Compare* Edmondson, *supra* note 2, § 1:1 (stating that modern arbitrants seek final results and avoidance of costs and delays of litigation), *with* Cole, *supra* note 8, at 1236 (reasoning that medieval arbitrants sought to achieve final results through informal procedures).

[43] Edmondson, *supra* note 2, §§ 1:1, 1:4.

timately results in a decision that is final and binding on both arbitrants; however, the entire arbitral proceeding is a "creature of contract."[44] Arbitrants choose the arbitrator and determine which procedural rules will circumscribe the arbitrator's decision making.[45] Thus, although arbitration is speedier and more cost efficient than litigation, arbitrants sacrifice statutory and common-law procedural, evidentiary, and appellate rights that have developed to ensure fair and just litigation.[46]

Ostensibly, arbitrants seek to eliminate any unnecessary judicial interference in their disputes.[47] Until the FAA was passed in 1925, however, the federal courts were loath to relinquish their jurisdiction to arbitrators.[48] As more commercial actors opted for arbitration in the nineteenth century, federal courts crafted the ouster doctrine, which forbade courts from granting specific performance to executory arbitration agreements.[49] The ouster doctrine presumed that it would be inequitable to enforce a contract that ousted judicial jurisdiction in favor of a tribunal that was unbound by legal norms.[50] Because courts applying the ouster doctrine did not attempt a systematic effort to justify the doctrine, authorities are split on whether it was a defensive reaction to arbitration's increasing prominence or an effort to prevent inequitable adhesion contracts.[51]

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[44] *See Kaplan*, 514 U.S. at 942, 943 (holding that parties may determine which issues to arbitrate and that such determination essentially forecloses judicial decision on the merits of the dispute); *see also* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57–58, 64 (1995) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) and holding that court will enforce an award issued pursuant to arbitral procedures).

[45] EDMONDSON, *supra* note 2, § 1:1.

[46] *See Kaplan*, 514 U.S. at 942; UHC Mgmt. Co. v. Computer Scis. Corp., 148 F.3d 992, 998 (8th Cir. 1998). *But see* Action Indus., Inc., v. United States Fid. & Guar. Co., 358 F.3d 337, 340 (5th Cir. 2004) (holding that parties may contract for heightened judicial review).

[47] *See Kaplan*, 514 U.S. at 942, 943; Southland Corp. v. Keating, 465 U.S. 1, 7 (1984) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22 (1983)).

[48] *See, e.g.*, United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1010–11 (S.D.N.Y. 1915).

[49] *See, e.g.*, Mitchell v. Dougherty, 90 F. 639, 642 (3d Cir. 1898); Cole, *supra* note 8, at 1237.

[50] *See Mitchell*, 90 F. at 642 (stating that courts will not enforce contracts that "oust the jurisdiction of the courts, and substitute for them an extra-legal tribunal of their own creation, with power to finally and conclusively decide [a dispute]").

[51] *See Southland Corp.*, 465 U.S. at 13 (citing legislative history for proposition that ouster doctrine was premised on jurisdictional jealousy); *United States Asphalt*, 222 F. at 1010–11 (stating that courts would not forsake jurisdiction unless compelled by statute). *Compare* IAN R. MACNEIL, AMERICAN ARBITRATION LAW 60–61 (1992) (concluding that the ultimate rationale for ouster doctrine is unclear), *with* Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 138 & n.80

Despite its anti-arbitration tendencies, the ouster doctrine did not infect the federal judiciary's entire analysis of arbitration agreements.[52] Indeed, by 1924, the federal courts' treatment of arbitration agreements largely depended on the procedural posture of an arbitration.[53] If an arbitral proceeding was concluded and a final award rendered, courts would enforce the award.[54] Thus, although the ouster doctrine obstructed arbitral practice, the courts also recognized the inherent unfairness and inefficiency in overturning the results of a voluntary arbitration that the parties intended as final and binding.[55] The U.S. Supreme Court adopted this rationale in 1854, in *Burchell v. Marsh*, when it held that arbitral awards could not be overturned for legal or factual errors.[56] *Burchell* concerned a dispute between two interstate retail firms that agreed to settle all contractual disputes in arbitration.[57] The Court reasoned that awards were final judgments:

> Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, [arbitration] should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.[58]

(2002) (arguing that ouster doctrine was pretext for judicial hostility to arbitration, but citing authorities that disagree).

[52] *See* Burchell v. Marsh, 58 U.S. (17 How.) 344, 349, 350 (1854); Karthaus v. Ylas y Ferrer, 26 U.S. (1 Pet.) 222, 226–27, 230 (1828); *see also* Red Cross Line v. Atl. Fruit Co., 264 U.S. 109, 121 (1924) (citing *Burchell* and *Karthaus* for proposition that arbitral awards were enforceable in federal courts).

[53] *See Red Cross Line*, 264 U.S. at 121.

[54] *See, e.g.*, *Burchell*, 58 U.S. at 349; *Karthaus*, 26 U.S. at 226–27, 230; *see also* MacNeil, *supra* note 51, at 19–20 (explaining early American courts' distinction between enforcing pre-dispute agreements to arbitrate and arbitral awards).

[55] *See Burchell*, 58 U.S. at 349; *see also, e.g.*, White Star Mining Co. v. Hultberg, 77 N.E. 327, 335–36 (Ill. 1906) (citing *Burchell* and numerous state court decisions for proposition that awards could not be vacated for error of fact or law).

[56] *Burchell*, 58 U.S. at 349.

[57] *Id.* at 344–45.

[58] *Id.* at 349.

Thus, as early as 1854, it was well settled that searching judicial review of arbitral awards was incompatible with arbitration because it undermined finality.[59]

Contrary to its clear pro-award stance, however, the *Burchell* Court made clear that arbitral awards were not always final.[60] Indeed, the Court reasoned an award could be vacated for gross procedural irregularities such as bias or lack of due process.[61] Similarly, post-1854 courts did not always defer to arbitral awards; awards could be vacated for fraud, corruption, or arbitrator misconduct.[62] Nevertheless, as in *Burchell*, courts refused to analyze the legal or factual bases of awards.[63] Accordingly, early, modern vacatur review was decidedly limited: courts only sought to ensure that arbitral awards were derived from the fair, neutral proceeding contemplated in arbitration agreements.[64]

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[59] *See id.*; *see also* Underhill v. Van Cortlandt, 2 Johns Ch. 339, 361 (N.Y. Ch. 1817), *quoted in* MACNEIL, *supra* note 51, at 19. Before *Burchell* was decided, in 1817, in *Underhill v. Van Cortlandt*, the New York Court of Chancery, the highest court of equity in New York before 1848, reasoned that arbitration awards were final judgments. *See* MACNEIL, *supra* note 51, at 19. The *Underhill* Court stated the following:

> If every award must be made conformable to what would have been the judgment of [the] . . . Court in the case, it would render arbitrations useless and vexatious, and a source of great litigation; for it very rarely happens that both parties are satisfied. The decision by arbitration is the decision of a tribunal of the parties' own choice and election. It is a popular, cheap, convenient, and domestic mode of trial, which the courts have always regarded with liberal indulgence; they have never exacted from these unlettered tribunals, this rusticum forum, the observance of technical rule and formality. They have only looked to see if the proceedings were honestly and fairly conducted, and if that appeared to be the case, they have uniformly and universally refused to interfere with the judgment of the arbitrators.

2 Johns Ch. at 361, *quoted in* MACNEIL, *supra* note 51, at 19.

[60] *See Burchell*, 58 U.S. at 350.

[61] *See id.*

[62] *See, e.g.*, *White Star*, 77 N.E. at 336. In 1906, in *White Star*, the Illinois Supreme Court narrowly interpreted an arbitration agreement that assumed issuance of a legally correct award. *See id.* at 337. The court only reviewed the award for procedural irregularities because a more thorough legal error review would defeat the purpose of the arbitration agreement—litigation avoidance. *See id.* The *White Star* court also noted that the parties' agreement did not expressly provide for judicial review of the arbitrator's legal conclusions; however, the court stated that contractually heightened judicial review would be equally impermissible because it would "render this *and all similar arbitration* absolutely futile." *Id.* at 337 (emphasis added).

[63] *See id.*; *see also* MACNEIL, *supra* note 51, at 21–22 (finding that outside of ouster doctrine, federal arbitration law accorded with state law).

[64] *See, e.g.*, *Burchell*, 58 U.S. at 349.

B. *Text, Structure, and Legislative History: Presuming and Preserving Finality*

1. Text: Inherent Ambiguity and Seeming Judicial Expansion

Although the U.S. Supreme Court's decision in *Burchell* seemed to foreclose searching judicial review of final arbitral awards, in 1925, Congress enacted express, limited vacatur grounds in sections 9 and 10 of the FAA.[65] Section 9 of the FAA ensures private compliance with final arbitration awards through judicial coercion.[66] It allows an arbitrant to petition a federal district court for a judgment confirming the award within one year after it is entered.[67] If the award is confirmed, the court adopts the judgment of the arbitrator, and the award becomes fully enforceable at law.[68] Section 9's mandate is unambiguous: "[T]he court *must* grant such an order *unless* the award is vacated . . . as prescribed in section[] 10 . . . of this title."[69] Section 10 renders section 9's otherwise clear mandate uncertain; it states that a court "*may*" vacate an award because of procedural irregularities in the arbitral proceeding.[70] Under section 10, an award may be vacated for arbitral fraud, misconduct, undue means, bias, lack of a fair and impartial hearing, or if arbitrators exceed their powers as set forth in the arbitration agreement.[71]

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[65] *See id.* at 349; 9 U.S.C. §§ 9–10 (2000); *see also* Cole, *supra* note 8, at 1255 (arguing that enactment of section 10 was superfluous because the common law of arbitration already required limited vacatur review). *But see* Schmitz, *supra* note 51, at 149 (arguing that FAA's drafters rejected searching judicial review of arbitral awards as inimical to purposes of arbitration).

[66] *See* 9 U.S.C. § 9; *see also* Merit Ins. Co. v. Leatherby Ins. Co. 714 F.2d 673, 681 (7th Cir. 1983) (reasoning that FAA authorizes federal courts to make arbitration effective through award enforcement).

[67] 9 U.S.C. § 9.

[68] *Id.* §§ 9, 13.

[69] *Id.* § 9 (emphasis added).

[70] *Id.* § 10 (emphasis added); *see also* Cole, *supra* note 8, at 1258 (implying that permissive language in section 10 renders it susceptible to a pro- and anti-heightened-review interpretation); Goldman, *supra* note 8, at 180–81 (same).

[71] FAA section 10 provides, in pertinent part, that

> the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration: (1) Where the award was procured by corruption, fraud, or undue means. (2) Where there was evident partiality or corruption in the arbitrators, or either of them. (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

In addition to vacating an award under section 10, the U.S. Supreme Court and all the courts of appeals, except the Fourth Circuit, have developed non-statutory standards of review to vacate awards that were rendered in manifest disregard for the law, violated an expressed public policy, or otherwise were arbitrary and capricious.[72] Although such action would appear to be non-statutory, these common-law rules may actually represent courts setting aside awards when arbitrators exceed their powers in violation of section 10(a)(4).[73] Even under a non-textual interpretation, it is well settled that these grounds are construed narrowly.[74] Accordingly, an award's failure to survive a court's circumspect legal or factual review would be a wholly insufficient ground for non-statutory vacatur.[75]

2. Structure: Clear Division of Labor Between Arbitrators and Courts

In contrast to the ambiguous text of sections 9 and 10 of the FAA, the Act's structure reveals an unequivocal decision to distinguish

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(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10.

[72] *See, e.g.*, *Kaplan*, 514 U.S. at 942 (citing Wilko v. Swan, 346 U.S. 427, 436–37 (1953), for proposition that court may vacate award that is in "manifest disregard for the law"); Prudential-Bache Secs., Inc. v. Tanner, 72 F.3d 234, 241 (1st Cir. 1995) (holding that award may be vacated if arbitrator's decision would violate explicit public policy that is well-defined, dominant, and capable of being ascertained from the laws and legal precedents); Lifecare Int'l, Inc. v. CD Med., Inc., 68 F.3d 429, 435 (11th Cir. 1995) (holding that award can be vacated if "there is no ground whatsoever for" arbitrator's decision and thus, award is arbitrary and capricious). For a thorough review of non-statutory vacatur grounds, see generally Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 461–92 (1998).

[73] *See* 9 U.S.C. § 10(a)(4). Indeed, in 2003, in *Kyocera Corporation v. Prudential-Bache Trade Services, Inc.*, the Ninth Circuit Court of Appeals stated that the manifest disregard for the law standard was derived from section 10(a)(4). 341 F.3d 987, 997 (9th Cir. 2003); *see also* STEPHAN J. WARE, ALTERNATIVE DISPUTE RESOLUTION § 2.45 (2001) (reasoning that non-statutory vacatur grounds are outgrowth of courts' authority under section 10(a)(4) of FAA to overturn award in which arbitrator has exceeded his or her powers).

[74] *See, e.g.*, Advest, Inc. v. McCarthy, 914 F.2d 6, 10 (1st Cir. 1990).

[75] *See, e.g., id.*; *see also Kyocera*, 341 F.3d at 998 (reasoning that manifest disregard for the law and completely irrational standards are designed to prevent substantive judicial review, and stating that "[t]hese grounds afford an extremely limited review authority . . . that is designed to preserve due process but not to permit unnecessary intrusion into private arbitration procedures"); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933–34 (2d Cir. 1986) (holding that under manifest disregard standard, vacatur requires that arbitrator's legal error be so obvious that average arbitrator would instantly notice it).

sharply between the institutional roles of arbitrators and courts.[76] Sections 2 through 5 of the FAA set forth a pro-arbitration policy and expressly require courts to compel arbitration in accordance with terms set forth in parties' agreements.[77] Conversely, when parties seek judicial review of an arbitration award, sections 9 and 10 of the FAA instruct federal courts to conduct their review in accordance with statutory procedures.[78] In 1995, in *Mastrobuono v. Shearson Lehman Hutton, Inc.* and *First Options of Chicago, Inc. v. Kaplan*, the U.S. Supreme Court reasoned that the FAA's demarcation between the arbitral and judicial roles reflects the consensual nature of arbitration.[79] In these cases, the Court held that under the FAA, federal courts are required to compel arbitration and enforce arbitral awards in accordance with arbitral agreements.[80] Thus, if parties agree to arbitrate an issue and an arbitrator decides the issue pursuant to contractual rules, a court must confirm the arbitration's results absent egregious procedural irregularities.[81]

3. Legislative History: The Lack Thereof and Its Implications

The clear demarcation of arbitral and judicial authority set forth in the FAA's text and structure corresponds with Congress's primary purpose in passing the FAA—overruling the ouster doctrine to secure specific enforcement of pre-dispute arbitration agreements.[82] Beyond this purpose, however, congressional intent is unclear; indeed, there is no explicit legislative history concerning sections 9 and 10 of the FAA.[83] The FAA's status as "rubber stamped" legislation explains its lack of legislative history; Congress did not draft the FAA—instead it

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[76] *See Volt*, 489 U.S. at 474–75 (reasoning that under section 4 of FAA, a court only has authority to compel arbitration "*in the manner provided for in [the parties' agreement]*"); *see also Mastrobuono*, 514 U.S. at 57–58 (quoting *Volt* and holding that FAA only ensures enforcement of awards rendered in accordance with parties' agreement); *Kyocera*, 341 F.3d at 1000 (reasoning that under *Volt*, courts must compel arbitration pursuant to contract, but that judicial review of arbitral award is limited to statutory vacatur grounds); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 935 (10th Cir. 2001) (distinguishing section 4 of the FAA from section 9 on ground that section 4 requires court to issue order in accordance with parties' agreement and section 9 mandates statutory analysis).

[77] *See* 9 U.S.C. §§ 2–5; *Volt*, 489 U.S. at 474–75, 476; *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24.

[78] *See* 9 U.S.C. §§ 9–10; *Bowen*, 254 F.3d at 935.

[79] *See Kaplan*, 514 U.S. at 942, 943; *Mastrobuono*, 514 U.S. at 57 (quoting *Volt*, 489 U.S. at 479).

[80] *Kaplan*, 514 U.S. at 942, 943; *Mastrobuono*, 514 U.S. at 57–58.

[81] *See Kaplan*, 514 U.S. at 942–43; *Mastrobuono*, 514 U.S. at 57–58, 64.

[82] *See, e.g.*, Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219–20 & n.6 (1985) (quoting H.R. REP. No. 68-96, at 1–2 (1924)); *Southland Corp.*, 465 U.S. at 13 (same).

[83] *See* Cole, *supra* note 8, at 1255.

adopted a draft statute prepared by the American Bar Association (the "ABA").[84] To derive legislative intent from this "statute of adhesion," Professor MacNeil, author of the leading treatise on the FAA, suggests analyzing both Congress's stated understanding of the ABA draft and the intent of the ABA.[85]

The express legislative history reflects that in addition to desiring specific enforcement of arbitral agreements, Congress believed that the FAA would allow parties to avoid expensive litigation and would concomitantly increase judicial economy.[86] There was little debate over the FAA; in particular, there was no discussion regarding judicial review of arbitration awards.[87] Given the legal framework in which Congress was operating, this seeming consensus is not surprising; by 1925, it was well settled that arbitration awards could be vacated only for procedural irregularities.[88]

In contrast to the ambiguity surrounding the express congressional understanding of sections 9 and 10 of the FAA, the ABA took definitive steps to confine judicial review of arbitral awards.[89] The ABA sought to avoid any unnecessary judicial interference with arbitration by crafting a modern arbitration statute—one that required the enforcement of pre-dispute arbitration agreements and that also provided explicit procedures for confirming and vacating awards.[90] Significantly, the ABA modeled its draft on the New York Arbitration Law of 1920; this choice had important implications for the FAA's vacatur provisions.[91]

The New York statute assumed the application of the New York Code of Civil Procedure, which mandated the limited standards of judicial review that are set forth in section 10 of the FAA.[92] Although the ABA's initial draft neglected to mandate this limited vacatur procedure

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[84] *See* MACNEIL, *supra* note 51, at 107–08; MACNEIL ET AL., *supra* note 14, § 8.1.

[85] MACNEIL, *supra* note 51, at 108.

[86] H.R. REP. No. 68-96, at 1–2, *quoted in Byrd*, 470 U.S. at 219–20 & n.6; *Bills to Make Valid and Enforceable Written Provisions or Agreements of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States* or *Territories or with Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. on the Judiciary*, 68th Cong. 21 (1924), *quoted in* MACNEIL, *supra* note 51, at 92.

[87] MACNEIL ET AL., *supra* note 14, §§ 8.1–.2; Cole, *supra* note 8, at 1255.

[88] Cole, *supra* note 8, at 1255.

[89] *See* MACNEIL ET AL., *supra* note 14, § 8.1; *see also* Schmitz, *supra* note 51, at 149–50 (reasoning that FAA's drafters debated and rejected provisions mandating legal error review of arbitral awards).

[90] *See* MACNEIL ET AL., *supra* note 14, § 8.1; Schmitz, *supra* note 51, at 150.

[91] MACNEIL ET AL., *supra* note 14, § 8.1.

[92] *See id.* § 9.3 n.16.

specifically, the draft that Congress codified expressly adopted the New York Code's limited vacatur standards.[93] Limited vacatur review was sharply distinguishable from the vacatur framework mandated under the two other modern arbitration statutes then in existence.[94] The 1917 Illinois arbitration statute and the English Arbitration Act of 1889 allowed either arbitrant to obtain a definitive judicial ruling on a legal issue that arose during an arbitration; in addition, under the Illinois statute, after an arbitrator rendered a final award, either arbitrant could compel the arbitrator to submit factual conclusions to a court for a definitive legal ruling.[95]

Professor MacNeil, among others, suggests that the rejection of the Illinois and English models was a deliberate reaction against a mechanism that conflicted with the well settled understanding that arbitrators could finally decide legal and factual questions.[96] The shift of final decision making from arbitrators to courts was an anathema to the proponents of the FAA and thus, the adoption of the New York code's limited procedural irregularity vacatur grounds was a conscious decision to insulate awards from judicial second-guessing.[97]

C. *The U.S. Supreme Court's Implicit Distinction Between Arbitral and Judicial Proceedings and Its Limited Section 10 Jurisprudence*

The history of arbitration and the text, structure, and legislative history of the FAA have greatly informed the U.S. Supreme Court's FAA jurisprudence.[98] The Court has interpreted the FAA as setting forth a pro-arbitration policy, which requires judicial respect for parties' arbitral procedures.[99] Nevertheless, the Court also has reasoned that the FAA's pro-arbitration policy does not mandate augmenting judicial

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[93] *See id.* §§ 8.1, 9.3 n.16. Indeed, as Professor MacNeil notes, the FAA's vacatur grounds are nearly identical to those employed under the New York Arbitration Law of 1920. *Id.* § 9.3 n.16.

[94] *See* MACNEIL, *supra* note 51, at 31–33.

[95] *Id.* at 32, 37.

[96] *See id.* at 34; Schmitz, *supra* note 51, at 149–50. *But see* Cole, *supra* note 8, at 1255 (reasoning that FAA's drafters were unconcerned about judicial review and merely adopted common-law standard).

[97] *See* MACNEIL, *supra* note 51, at 33; MACNEIL ET AL., *supra* note 14, § 8.1; Schmitz, *supra* note 51, at 150.

[98] *See, e.g.*, *Volt*, 489 U.S. at 474–76.

[99] *See id.* at 475–76, 479.

procedures willy-nilly to reach pro-arbitration results.[100] The Court has not yet decided a case concerning heightened-review clauses.[101]

In 1989, in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, the U.S. Supreme Court held that the FAA does not require that arbitrants utilize particular arbitral procedures.[102] In *Volt*, the petitioner sought an order compelling arbitration while state court litigation relating to the arbitral dispute was pending.[103] Based on the conclusion that the parties had agreed to conduct their arbitration under California's arbitration law, which stayed arbitration during any pending litigation, the California courts refused to compel arbitration pursuant to section 4 of the FAA.[104] The petitioner argued that denial of the order was improper because California's arbitration law directly conflicted with the FAA, which required an automatic stay of litigation and compelled arbitration.[105]

The *Volt* Court held that the FAA's pro-arbitration policy did not mandate the use of particular arbitral procedures and thus, the parties could agree to arbitrate pursuant to California law.[106] Therefore, because the parties' agreement adopted a procedure that required an arbitral stay, the lower court's refusal to compel arbitration was consistent with section 4 of the FAA, which requires courts to compel arbitration pursuant to the terms of arbitral agreements.[107] In addition, the Court noted that there was no conflict between federal pro-arbitration policy and the California law because the arbitral stay rule encouraged arbitration by minimizing the potential for contradictory arbitral and judicial judgments.[108] The Court reasoned that the FAA was not intended to coerce parties into arbitrating; rather, the principal purpose of the Act was to overcome judicial reluctance to enforce arbitration agreements according to their terms.[109] Thus, any efficiency concerns were offset because Congress intended that parties determine arbitration's scope and procedure.[110] Therefore, the Court affirmed the lower

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[100] *See, e.g.*, *Kaplan*, 514 U.S. at 947–48.

[101] *See* Schoch v. Infousa, Inc., 341 F.3d 785 789–90 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 1414 (2004).

[102] *See* 489 U.S. at 476, 479.

[103] *Id.* at 471.

[104] *See id.* at 471–72.

[105] *See* 9 U.S.C. §§ 3–4 (2000); *Volt*, 489 U.S. at 474.

[106] *Volt*, 489 U.S. at 476.

[107] *See id.* at 475.

[108] *Id.* at 475 n.5, 476.

[109] *See id.* at 478–79.

[110] *See id.* at 479.

court's decision because it gave effect to the terms of the parties' agreement within the framework of the FAA's pro-arbitration policy.[111]

In 1995, in *Mastrobuono*, the U.S. Supreme Court reaffirmed *Volt*'s rationale.[112] In *Mastrobuono*, the arbitration agreement contained a New York choice of law clause.[113] Although New York precedent precluded arbitrators from granting punitive damages, the petitioner obtained a punitive damages award and sought enforcement.[114] The Court found that the parties intended New York substantive law, not decisional law, to govern their arbitral proceeding.[115] Therefore, the Court concluded that, under *Volt*'s interpretation of the FAA, the punitive damages award was enforceable.[116] Although *Mastrobuono* extended *Volt*'s rationale to the confirmation stage, the Court implicitly stressed *Volt*'s limitations in dicta.[117] The Court stated that its decision in *Volt* was predicated upon its finding that California's arbitral stay rule patently encouraged arbitration and thus, fostered the FAA's pro-arbitration policy.[118]

Shortly after *Mastrobuono* was handed down, in *Kaplan*, the U.S. Supreme Court considered whether federal courts or arbitrators should determine whether a particular dispute was within the scope of an arbitration agreement.[119] The Court reasoned that if an agreement authorized an arbitrator to decide questions of arbitrability then the parties effectively had relinquished their right to have a federal court determine the merits of such disputes.[120] Any subsequent judicial review was of little practical value because judicial confirmation of an arbitrator's decision was all but certain.[121] To exemplify the "unusual circumstances," in which a court might vacate an arbitrator's award, the Court cited the limited procedural irregularity grounds for vacatur in section 10 of the FAA and the manifest disregard for the law vacatur standard.[122] The Court then concluded that the arbitrability issue should be decided in accordance with the parties' agree-

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[111] *Volt*, 489 U.S. at 479.
[112] *See Mastrobuono*, 514 U.S. at 57.
[113] *Id.* at 53.
[114] *See id.*
[115] *See id.* at 63–64.
[116] *See id.* at 57–58, 64.
[117] *See Mastrobuono*, 514 U.S. at 53, 57, 64.
[118] *Id.* at 57.
[119] *Kaplan*, 514 U.S. at 941.
[120] *Id.* at 942, 943.
[121] *Id.* at 942.
[122] *Id.*

ment.[123] The Court opined that this finding was functionally sensible because arbitration is simply a mechanism for deciding only those disputes that the parties voluntarily agree to submit to an arbitrator.[124]

The *Kaplan* Court also examined the issue of whether an appellate court should apply a more lenient standard of review to a decision confirming an arbitration award.[125] Relying on Eleventh Circuit Court of Appeals precedent, the petitioner contended that the FAA's pro-arbitration policy required the use of an abuse of discretion standard rather than the more stringent clearly erroneous and de novo review normally conducted by the federal circuit courts of appeals.[126] The Court rejected this argument.[127] First, the Court concluded that constructing varying standards of review merely to encourage arbitration rendered the law unnecessarily complex.[128] Second, the Court held that standards of review are predicated upon institutional advantages, not their tendency to produce particular results.[129] To illustrate this point, the Court stated that the decisions of administrative agencies are reviewed for abuse of discretion and implied that this standard was applied because of agency expertise and statutory authority to make law.[130] Accordingly, the deferential standard of review applied to administrative decisions was not developed to reach a particular result, but to ensure that judicial policy determinations would not de-

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[123] *Id.* at 943.

[124] *Kaplan*, 514 U.S. at 943; *see also* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452–53 (2004) (plurality opinion) (reasoning that arbitrators are well-situated to decide matters of contractual interpretation because the parties expressly selected them for this task).

[125] *Kaplan*, 514 U.S. at 947–48.

[126] *Id.* at 941, 948.

[127] *See id.* at 948.

[128] *See id.*

[129] *See id.*

[130] *See Kaplan*, 514 U.S. at 948 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984)). In 1984, in *Chevron*, the U.S. Supreme Court held that when Congress empowers an administrative agency to oversee a legislative program, it concomitantly grants that agency the authority to formulate policies and rules to fill legislative gaps. 467 U.S. at 843. If a court finds that Congress so ceded this authority and the agency's decision making was not arbitrary or capricious, it should uphold the decision of the agency. *See id.* at 844–45; *see also* Cole, *supra* note 8, at 1260 (reasoning that arbitrary and capricious review of administrative agencies' decisions accords judicial respect to agencies' decision-making authority).

feat congressional intent.[131] The Court stated that courts' deference to arbitral decisions was predicated upon a similar rationale.[132]

The U.S. Supreme Court's FAA jurisprudence adheres to the arbitral/judicial distinction set forth in the FAA.[133] Thus, on the one hand, the *Kaplan* Court was unwilling to craft judicial procedures merely to encourage arbitration.[134] On the other hand, under *Volt* and *Mastrobuono*, arbitral procedures are creatures of contract and must be enforced under the FAA specifically.[135] The heightened-review circuit split is an outgrowth of this nuanced approach.[136] The federal circuit courts of appeals have either upheld heightened-review clauses under *Volt's* "hands-off" approach to pro-arbitration policy or implicitly followed *Kaplan* and refused to adopt standards of review that are incompatible with the institutional advantages of arbitration.[137]

II. The Current Circuit Split: Trending away from Policy and Towards Judicial Integrity

Since 1994, when the Second Circuit Court of Appeals enforced a contractual standard of review clause, the courts of appeals have adopted three modes of analysis to determine whether heightened standard of review clauses are enforceable under the FAA.[138] The Third,

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[131] *See Chevron*, 467 U.S. at 845 (quoting United States v. Shimer, 367 U.S. 374, 382, 383 (1961)).

[132] *See Kaplan*, 514 U.S. at 948; *see also Bowen*, 254 F.3d at 935 n.5 (citing U.S. Supreme Court labor arbitration precedents for proposition that courts defer to arbitral awards because parties agree to accept arbitrator's decision).

[133] *See* 9 U.S.C. §§ 2–5, 9–10 (2000). *Compare, e.g., Kaplan*, 514 U.S. at 942 (concluding that limited standards of judicial review apply to review of awards), *with Volt*, 468 U.S. at 474–75, 476, 479 (holding that courts must enforce parties' arbitral procedures under FAA).

[134] *See Kaplan*, 514 U.S. at 948.

[135] *See Mastrobuono*, 514 U.S. at 57–58; *Volt*, 468 U.S. at 479.

[136] *Compare, e.g., Kyocera*, 341 F.3d at 987, 1000 (drawing distinction between judicial and arbitral procedures similar to distinction in *Kaplan*), *with* Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 292–93 (3d Cir. 2001) (ignoring any arbitral/judicial distinction and citing *Volt* and *Mastrobuono* for proposition that, under FAA, courts must enforce arbitration agreements according to their terms).

[137] *Compare, e.g., Bowen*, 254 F.3d at 935 (reasoning that standard of review should be crafted to maintain arbitration's effectiveness), *with* Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 996–97 (5th Cir. 1995) (reasoning that parties' contract governs judicial review of award regardless of effect on institutional advantages of arbitration).

[138] *See* Westinghouse Elec. Corp. v. N.Y. City Transit Auth., 14 F.3d 818, 821 (2d Cir. 1994); *see also* Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 998–1000 (9th Cir. 2003) (describing circuit split). In 1994, in *Westinghouse*, the Second Circuit Court of Appeals upheld the enforcement of a *decreased* standard of review clause. *See* 14 F.3d at 821–22. Nevertheless, several prominent commentators have cited the decision for the proposition that heightened-review clauses are enforceable under the FAA. *See, e.g.*,

Fourth, and Fifth Circuit Courts of Appeals have held that the FAA's pro-arbitration policy requires enforcement.[139] Like these courts, the Tenth Circuit Court of Appeals has reasoned that pro-arbitration policy furnishes the analytical framework applicable to heightened-review clauses, however, it refused enforcement because heightened-review clauses are detrimental to the continued viability of arbitration.[140] Although the Eighth Circuit Court of Appeals found the Tenth Circuit's reasoning persuasive and has expressed serious doubt about the propriety of heightened-review clauses, it has nonetheless declined to address the issue until it is presented with an explicit intent to contract for heightened review.[141] In contrast, the Ninth Circuit Court of Appeals reasoned that pro-arbitration policy requires preserving arbitral finality, but concluded that heightened-review clauses are foreclosed under the FAA's text and Article III of the U.S. Constitution.[142] Finally, in a recent development, the Second Circuit Court of Appeals' reasoning in 2003, *Hoeft v. MVL Group, Inc.*, suggests that the extraordinary circumstances test set forth by the U.S. Supreme Court in 1994, in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, could furnish the standard for analyzing the enforceability of heightened standard of review clauses.[143]

EDMONDSON, *supra* note 2, § 39:15 n.1. The Second Circuit appears to have overruled *Westinghouse*. *See* Hoeft v. MVL Group, Inc., 343 F.3d 57, 66 (2d Cir. 2003).

[139] Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 292–93 (3d Cir. 2001); Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 996–97 (5th Cir. 1995); Syncor Int'l Corp. v. McLeland, No. 96-2261, 1997 WL 452245, at *6 (4th Cir. Aug. 11, 1997) (unpublished per curiam opinion).

[140] *See* Bowen v. Amoco Pipeline Co., 254 F.3d 925, 933, 935 (10th Cir. 2001).

[141] *See* Schoch v. Infousa, Inc. 341 F.3d 785, 789 & n.3 (8th Cir. 2003) (quoting UHC Mgmt. Co. v. Computer Scis. Corp., 148 F.3d 992, 997 (8th Cir. 1998)), *cert. denied*, 124 S. Ct. 1414 (2004).

[142] *See Kyocera*, 341 F.3d at 994, 998. In 1991, in *Chicago Typographical Union v. Chicago Sun-Times*, the Seventh Circuit Court of Appeals reached a similar conclusion, albeit in the labor arbitration context. *See* 935 F.2d 1501, 1504–05 (7th Cir. 1991). In *Chicago Typographical*, the appellant argued that an arbitral award should be vacated because the arbitrator misinterpreted the contract. *Id.* at 1503. The court concluded that an arbitration agreement could not grant federal courts the authority to review an arbitrator's decision substantively. *See id.* at 1504. Although the court did not consider the propriety of heightened-review clauses, several courts and commentators have cited *Chicago Typographical* for the proposition that heightened-review clauses are invalid in the Seventh Circuit, because the court stated, "parties . . . can contract for an appellate arbitration panel to review the arbitrator's award. . . . but they cannot contract for *judicial* review of that award . . . ." *Id.* at 1505 (emphasis added); *see, e.g.*, *Kyocera*, 341 F.3d at 999; Cole, *supra* note 8, at 1244–45.

[143] *See Hoeft*, 343 F.3d at 64–66 (citing U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 26, 29 (1994)).

A. *Judicial Review as a Matter of Contract: Pro-Heightened-Review Courts' Default Analysis of the FAA*

In 1995, in *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, the Fifth Circuit enforced a heightened-review clause that required a district court to conduct legal error review.[144] The Fifth Circuit held that heightened review was proper in this instance because the parties had contracted explicitly for a more searching judicial inquiry.[145] The court reasoned that the U.S. Supreme Court's holdings in 1989 and 1995, in *Volt Information Systems v. Board of Trustees of Leland Stanford Junior University* and *Mastrobuono v. Shearson Lehman Hutton, Inc.*, respectively, supported its conclusion.[146] In these cases, the Court held that the FAA's provisions did not preempt procedural rules that parties incorporated in arbitration agreements.[147] Thus, by analogy, the Fifth Circuit held that contractual intent required enforcement.[148]

In 2001, in *Hughes Training Co. v. Cook*, the Fifth Circuit reaffirmed the validity of *Gateway* and clarified the contours of its heightened-review jurisprudence.[149] The arbitration agreement in *Cook* required a federal court to review an award de novo.[150] The court concluded that parties could expand judicial review of an arbitration award because vacatur review was an *arbitral* procedure, which pursuant to the U.S. Supreme Court's interpretation of the FAA's pro-arbitration policy, could be structured to meet parties' needs.[151]

In 2004, in *Action Industries, Inc. v. United States Fidelity & Guaranty Co.*, the Fifth Circuit again clarified the underpinnings of its pro-heightened-review jurisprudence.[152] The agreement at issue contained a Tennessee choice of law clause, which provided for a circumspect legal review.[153] The court held the clause was invalid because it did not express a clear intent to opt out of the FAA's default vacatur

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[144] 64 F.3d 993, 997 (5th Cir. 1995).

[145] *Id.* at 996–97.

[146] *See id.* 996, 997 & n.3.

[147] *See id.* at 996.

[148] *See id.* at 996–97.

[149] *See* 254 F.3d 588, 592–93 (5th Cir. 2001) (citing *Gateway*, 64 F.3d at 997); *see also* Prescott v. Northlake Christian Sch., 369 F.3d 491, 496 (5th Cir. 2004) (reaffirming that *Gateway* stands for the proposition that parties may alter FAA's default standard of vacatur review because arbitration is "a creature of contract"); Harris v. Parker College of Chiropratic, 286 F.3d 790, 793 (5th Cir. 2002) (same).

[150] *See Cook*, 254 F.3d at 590, 594.

[151] *See id.* at 592–593.

[152] *See* 358 F.3d 337, 341 n.10 (5th Cir. 2004).

[153] *Id.* at 340 n.9.

rules.[154] In a footnote, however, the Fifth Circuit also summarily reasoned that *Mastrobuono* overruled the primacy of the FAA's vacatur standards.[155] In analyzing *Mastrobuono,* the court stated that the agreement at issue in that case concerned *arbitral* procedures; however, it read *Mastrobuono* to stand for the proposition that FAA rules apply to *judicial* proceedings absent the parties' clear intent to augment them.[156]

The Third Circuit Court of Appeals adopted a similar analysis, in 2001, in *Roadway Package System, Inc. v. Kayser.*[157] *Roadway* centered on the interpretation of a generic choice of law clause, which required a court to apply Pennsylvania's vacatur rules to an award.[158] The Third Circuit held that parties could opt out of the FAA's default vacatur standards.[159] Like the Fifth Circuit, the *Roadway* court relied on *Volt* and *Mastrobuono*'s interpretation of the FAA's pro-arbitration policy and concluded that vacatur review was an arbitral procedure that parties could alter contractually.[160]

Nevertheless, because private alteration of a statutory standard of review was essentially unprecedented, considerations of fairness compelled the Third Circuit to require express intent before finding that parties opted out of the FAA's default regime.[161] The court considered an express intent rule salutary because of its easy applicability and minimal transaction costs.[162] Sophisticated actors who agreed to heightened review could easily draft an agreement clearly evidencing such intent, which the courts could then enforce without employing a detailed statutory and contractual analysis.[163] Accordingly, the court reasoned that its default rule would increase judicial and bargaining efficiency.[164]

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[154] *Id.* at 343.

[155] *See id.* at 341 & n.10.

[156] *See id.* at 341–42, 343.

[157] *See* 257 F.3d at 292–93.

[158] *See id.* at 288, 291 n.2.

[159] *Id.* at 288, 293.

[160] *See id.* at 292. The Third Circuit reasoned that under the FAA, courts should enforce heightened- or decreased-review clauses. *See id.* at 296.

[161] *See id.* at 294, 296–97 & n.5. The Third Circuit could cite no other federal statute that set forth default standards of review. *Id.* at 294.

[162] *See Roadway,* 257 F.3d at 297.

[163] *See id.* The Fifth Circuit used the term "sophisticated parties" to refer to parties who hired lawyers to draft their agreements. *Id.*

[164] *See id.* at 296, 297.

B. *Proceeding with Caution: The Eighth Circuit's Noncommittal Approach*

In 1998, in *UHC Management Co., Inc. v. Computer Sciences Corp.*, the Eighth Circuit Court of Appeals refused to apply a heightened-review clause because the parties did not clearly express an intent to opt out of the FAA.[165] The agreement stated that the decision of the arbitrator was final and binding and the court interpreted this statement to foreclose subsequent substantive judicial review.[166] In dicta, the Eighth Circuit took issue with the Fifth Circuit's interpretation of *Volt* and *Mastrobuono*.[167] The court opined that it was curious for three reasons to undertake a searching judicial inquiry when arbitration was contemplated.[168] First, the text of the FAA explicitly required confirmation, unless an award was vacated under section 10.[169] Second, because the parties voluntarily agreed to arbitrate under the FAA, they essentially assumed the risk of forgoing a more searching judicial review.[170] Finally, the parties could have contracted for an arbitral appellate panel and thus, obtained heightened review without resorting to litigation.[171]

The Eighth Circuit's skeptical heightened-review jurisprudence was extended in 2003, in *Schoch v. Infousa, Inc.*[172] At issue in *Schoch* was a clause requiring that an arbitral award accord with applicable law.[173] The court found persuasive, but declined to adopt, the view that heightened-review clauses were unenforceable because they trenched on the institutional integrity of the federal courts and threatened the viability of arbitration.[174] Effectively, the court reasoned, the parties to a heightened-review agreement privately altered the FAA and transformed the nature of arbitration and judicial review.[175] Such results seemed inconsistent with the FAA because arbitration is a private sys-

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[165] *See* 148 F.3d at 997.

[166] *Id.* at 998.

[167] *See id.* at 995–98. The Eighth Circuit cited *Volt* for the proposition that the FAA granted parties the right to craft arbitral procedures that the federal courts would enforce. *Id.* at 997. The court was unwilling to conclude that this right was coextensive with the authority to alter judicial review contractually, especially "when Congress has ordained a specific, self-limiting procedure for how such a review is to occur." *Id.*

[168] *Id.* at 997–98.

[169] *See id.* at 997.

[170] *See UHC*, 148 F.3d at 998.

[171] *See id.* at 997–98 (quoting LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 891 (9th Cir. 1997) (Mayer, J., dissenting)).

[172] *See* 341 F.3d at 789 & n.3.

[173] *Id.* at 787–88.

[174] *See id.* at 789 n.3.

[175] *Id.*

tem of justice designed to eliminate the cost and delay of litigation.[176] The court suggested that the benefits of arbitration could only be maintained through a restrictive standard of review because otherwise, arbitration would become a mere preliminary step toward litigation.[177]

C. *A Dualist Approach to Rejecting Heightened-Review Clauses*

1. The Tenth Circuit's Pro-Arbitration Policy Approach

Despite the grave skepticism of the Eighth Circuit Court of Appeals, the heightened-review circuit split first manifested in 2001, when the Tenth Circuit Court of Appeals decided *Bowen v. Amoco Pipeline Co.*[178] In *Bowen*, the parties agreed that a court could vacate an award if it lacked evidentiary support.[179] The Tenth Circuit acknowledged both that the FAA's pro-arbitration policy was well settled and that there was no clear authority allowing heightened review.[180] Accordingly, the court held that the enforceability of heightened-review clauses turned on whether such practice encouraged the final and binding arbitration protected under the FAA.[181] The court then concluded that pro-arbitration policy was only coextensive with private ordering of *arbitral* proceedings, which the FAA defined in opposition to *judicial* procedures.[182] Indeed, the court reasoned that the efficacy of arbitration required a strict separation of arbitration and adjudication.[183]

The court offered four reasons supporting this view.[184] First, in contradiction to the FAA's purpose, heightened-review clauses tend to erode judicial respect for arbitration.[185] The judiciary should defer to the arbitral procedure, but that process was complete when parties resorted to the federal courts; allowing judicial intermeddling at that

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[176] *See id.* (citing Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1254 (7th Cir. 1994)).

[177] *See Schoch*, 341 F.3d at 789 n.3 (citing *Eljer*, 14 F.3d at 1254).

[178] *See* 254 F.3d at 936.

[179] *Id.* at 930.

[180] *See id.* at 933–34.

[181] *See id.* at 934. The *Bowen* court stated, "the contractual nature of arbitration is, therefore, well established. . . . And our decision today must further the FAA's primary policy ensuring judicial enforcement of private agreements to arbitrate." *Id.*

[182] *See id.* at 935.

[183] *See Bowen*, 254 F.3d at 935.

[184] *See id.* at 935–36.

[185] *See id.* at 935.

late point would eviscerate the utility of litigation avoidance.[186] Second, the structure of the statutory text codified the distinction between arbitral and judicial procedures.[187] For example, under section 4, federal courts are required to compel arbitration in accordance with the parties' agreement, but under sections 9 and 10 an award must be confirmed or vacated under a statutory procedure.[188] Third, the court reasoned that the federal courts were ill equipped to judge the propriety of arbitrations, which are often conducted by industry experts acting pursuant to a myriad of rules that do not conform to legal norms.[189] Finally, this was a fair result because arbitrants could contract for an arbitral appellate panel.[190]

2. Beyond Pro-Arbitration Policy: The Ninth Circuit's Textualist Approach

In 2003, in *Kyocera Corp. v. Prudential-Bache Trade Services Co.*, the Ninth Circuit Court of Appeals, sitting en banc, adopted the Tenth Circuit's policy rationales, but held that enforcement of heightened-review clauses was unconstitutional.[191] At issue in *Kyocera* was an arbitration agreement mandating substantial evidence and de novo review.[192] Because the U.S. Constitution grants Congress plenary power to determine federal judicial procedures, the Ninth Circuit held that heightened-review clauses were invalid.[193] Unlike the *Bowen* court, the Ninth Circuit's holding relied solely on Congress's jurisdictional authority; because the FAA's narrow vacatur review was clear and explicit, enforcement of heightened-review clauses was an unconstitutional usurpation of Congress's constitutional prerogative.[194]

Like the Tenth Circuit, however, the *Kyocera* court reasoned that other policy considerations militated strongly against enforcing

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[186] *See id.* In a footnote, the court also reasoned that heightened-review clauses would tend to increase the costs of arbitration itself. *Id.* at 936 n.7. Because expanded review would require arbitrators to produce written opinions, the efficiency of arbitration would be sacrificed. *Id.* This would transform arbitration from a litigation alternative to "yet another step on the ladder of litigation." *Id.*

[187] *See id.* at 935.

[188] *See Bowen*, 254 F.3d at 935 (citing 9 U.S.C. §§ 4, 10–11 (2000)).

[189] *See id.* at 935–36.

[190] *See id.* at 936–37 (citing *UHC*, 148 F.3d at 997–98; *Chi. Typographical*, 935 F.2d at 1504–05).

[191] *See* 341 F.3d at 994, 998, 1000.

[192] *See id.* at 990–91.

[193] *See id.* at 994.

[194] *See id.* at 994, 1000.

heightened-review clauses.[195] The *Kyocera* court interpreted the FAA as allowing parties to trade the costs associated with the federal courts' circumspect legal decisions for an arbitral determination.[196] Thus, because expanded judicial review would require increased delay and formality, the propagation of heightened-review clauses would tend to erode the benefits of arbitration.[197] If parties desired this result, they could contract for an arbitral appellate panel.[198] Finally, the court reasoned that even if the FAA's vacatur standard was ambiguous, it was well settled that only courts may interpret statutory text to develop appropriate standards of review.[199]

D. *Recent Development: The Second Circuit Holds that Judicial Standards of Review Are Not the Property of Private Litigants*

In 2003, in *Hoeft*, the Second Circuit Court of Appeals held that arbitrants could not contract for decreased judicial review of an award.[200] The agreement at issue in *Hoeft* provided that arbitral awards were final and binding and not subject to judicial review.[201] The Second Circuit reasoned that the FAA's vacatur standards represent a safety net that undergirds the Act's pro-arbitration policy.[202] Courts are required to defer to arbitral agreements because they retain a limited vacatur authority, which prevents courts from sanctioning unjust arbitral proceedings.[203] In response to the appellant's claim that nonstatutory vacatur standards could be contractually precluded because, as a common-law rule, they were entitled to less protection than the FAA's vacatur grounds, the court cited *Bowen* for the proposition that arbitrants may not interfere with judicial processes by contract.[204]

In addition, the court supported its conclusion with U.S. Supreme Court precedent.[205] Relying on the Court's decision in 1994, in *Bonner Mall*, the Second Circuit held that standards of review, like judicial precedents, are not the property of private litigants.[206] Thus,

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[195] *See id.* at 998.
[196] *See Kyocera*, 341 F.3d at 998.
[197] *See id.*
[198] *Id.* at 1000.
[199] *Id.*
[200] *See* 343 F.3d at 65.
[201] *Id.* at 60.
[202] *See id.* at 63, 64.
[203] *See id.*
[204] *See id.* at 65 (citing *Bowen*, 254 F.3d at 936 n.8).
[205] *Hoeft*, 343 F.3d at 65.
[206] *See id.* (citing *Bonner Mall*, 513 U.S. at 29).

even though the manifest disregard of the law standard was created judicially, it could not be preempted by contract.[207] Rather, arbitrants take arbitration law as they find it, complete with the FAA and common-law vacatur standards.[208] Although arbitrants may customize their private proceedings, they may not override statutory or judicial authority.[209] This is because courts, unlike arbitrators, are authorized to review arbitral awards pursuant to statute, not contract.[210] Therefore, the court implied that contractually mandated decreased review compromises courts' institutional integrity.[211]

E. *Previous Scholarly Attempts at an Analytical Framework*

The variant approaches—contractual, intentionalist, and textualist—that courts have applied to determine the validity of heightened-review clauses prompted two attempts to develop a uniform analytical framework.[212] To resolve the circuit split, the "managerial litigation model" and the "arbitral appellate model" attempt to enforce heightened-review clauses under a consistent rubric to ensure the preservation of judicial integrity.[213]

Under the managerial litigation model, a court would only acquiesce to parties' heightened-review requests provided that the parties' agreement did not require courts to make arbitrary and capricious decisions.[214] Accordingly, the model suggests a two-prong test requiring enforcement if there is both (1) a sufficient arbitral record, and (2) a contractual standard of review, such as legal error review,

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[207] *See id.* at 64–65.

[208] *See id.* at 65–66.

[209] *See id.*

[210] *See Hoeft*, 343 F.3d at 65–66.

[211] *See id.* at 64, 65, 66. The Second Circuit also distinguished *Katz v. Feinberg*, in which it allowed the parties to preclude arbitral review of an arbitration award. *Id.* at 65–66 (citing Katz v. Feinberg, 290 F.3d 95, 98 (2d Cir. 2002)). The court held that there was no contradiction between precluding arbitral review of an award and disallowing equivalent preclusion of judicial review. *Id.* at 66. Although arbitration is a creature of contract, fully malleable by the parties, judicial authority to review an arbitration award derives from statutory, not private, authority. *Id.*

[212] *See* Cole, *supra* note 8, at 1203, 1205–06; van Ginkel, *supra* note 8, at 188–92.

[213] *Compare* Cole, *supra* note 8, at 1259–60, 1263 (arguing that managerial litigation model prevents judiciary from making arbitrary and capricious decisions), *with* van Ginkel, *supra* note 8, at 197–98 (arguing that proper distinction between arbitral appeal and vacatur allows courts to enforce heightened-review clauses under U.S. Supreme Court's FAA jurisprudence).

[214] *See* Cole, *supra* note 8, at 1259, 1260.

that would not compromise the court's integrity.[215] Adherents to this view argue that it encourages party autonomy and more efficacious dispute resolution without sacrificing judicial integrity.[216] Proponents also point out that the vacatur-by-settlement procedure at issue in the U.S. Supreme Court's 1994 decision, in *Bonner Mall*, is similar to heightened-review clauses because both requests implicate judicial integrity concerns.[217] Nevertheless, these scholars reason that *Bonner Mall*'s analysis is likely inapposite to the current debate because enforcing heightened-review clauses does not implicate the Court's concerns with collateral attacks and the devaluation of precedent.[218]

The arbitral appellate model presumes that constitutional and textual concerns are not implicated in a heightened-review request because section 10 of the FAA codifies *vacatur* standards.[219] Vacatur review is an extremely narrow inquiry, which assumes that parties have agreed to arbitrate their dispute in one final instance.[220] In the heightened-review context, however, the parties disclaim arbitral finality and voluntarily contract for a more accurate, albeit less efficient, result.[221] Thus, once courts are freed from conflating vacatur review with the appellate review requested under a heightened-review clause, enforcement is purely a policy decision.[222] Therefore, because the FAA's pro-arbitration policy requires the promotion of party autonomy through specific enforcement of arbitration agreements, the FAA requires enforcement of heightened-review clauses.[223]

These previous attempts to formulate a uniform standard of review illustrate the importance of balancing pro-arbitration policy with judicial integrity.[224] Indeed, the U.S. Supreme Court also recognized, in *Bonner Mall*, that alternative dispute resolution methods mandating perfunctory judicial enforcement pose a threat to judicial integrity.[225] The Court's approach to this dilemma is the extraordinary circum-

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[215] *See id.* at 1263. An example of a standard of review that would compromise institutional integrity is the "flip[ping] of a coin or studying the entrails of a dead fowl . . . ." *Id.*

[216] *Id.*

[217] *See id.* at 1216–17.

[218] *See id.* at 1216.

[219] *See* van Ginkel, *supra* note 8, at 188, 192.

[220] *See id.*

[221] *See id.* at 212–13.

[222] *Id.* at 192.

[223] *Id.* at 194, 197–98.

[224] *See* Cole, *supra* note 8, at 1259; van Ginkel, *supra* note 8, at 198.

[225] *See Bonner Mall*, 513 U.S. at 26–29; *see also* Cole, *supra* note 8, at 1216 (reasoning that vacatur by contract implicates courts' concern with maintaining finality of litigation and value of precedent).

stances test.[226] In contrast to the managerial litigation model, the Second Circuit Court of Appeals has not limited *Bonner Mall* to its facts.[227] Instead, in *Hoeft*, the court employed *Bonner Mall*'s reasoning to defeat a decreased standard of review clause.[228] Given the importance of a proper interpretation of U.S. Supreme Court precedent to the heightened-review dilemma, the question arises whether the Second Circuit's interpretation was correct.[229]

III. *Bonner Mall* and Its Forerunner in the Arbitral Context

In 1994, in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, the U.S. Supreme Court held that a settlement agreement, standing alone, could not justify vacating precedent.[230] While the case was pending before the Court, the parties in *Bonner Mall* agreed to settle and stipulated that the settlement mooted the case.[231] In the interim, the Ninth Circuit Court of Appeals had affirmed a "new value excep-

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[226] *See Bonner Mall*, 513 U.S. at 26–29.

[227] *See Hoeft*, 343 F.3d at 65. *But see* Cole, *supra* note 8, at 1216 n.88 (suggesting that *Bonner Mall*'s rationale with respect to mutual vacatur requests was dicta).

[228] *See Hoeft*, 343 F.3d at 65.

[229] *Cf.* Schmitz, *supra* note 51, at 197–98 (arguing that variant interpretations of U.S. Supreme Court precedent have perpetuated heightened-review circuit split). In *Hoeft*, the Second Circuit implied, in dicta, that its *Bonner Mall* analysis might not be applicable to heightened-review clauses, which posed different concerns than a clause that eliminates any judicial review of an award. 343 F.3d at 64. The Second Circuit did not elaborate on this suggestion; however, these reservations seem akin to equitable concerns raised by pro-heightened-review courts, which conclude that contractual fairness should compel courts to enforce arbitral agreements that contemplate heightened-review. *Compare, e.g.*, *id.* (implying that agreement requiring heightened-review might not offend judicial integrity because it would not force court to act as rubber stamp), *with Hughes*, 254 F.3d at 594 (reasoning that heightened-review clause is an equitable procedure because it is fully available to both parties). Notably, just five days before *Hoeft* was decided, the Ninth Circuit Court of Appeals in *Kyocera*, implied, in dicta, that decreased-review clauses were less threatening to Congress's plenary procedural authority than heightened-review clauses. *See Kyocera*, 341 F.3d at 998–99 n.16.

The Second and Ninth Circuits' variant reasoning suggests a divergence on the issue of arbitral finality. *See Hoeft*, 343 F.3d at 64, 65; *Kyocera*, 341 F.3d at 998. The *Kyocera* court apparently views the FAA as a structure that preserves arbitral finality to ensure arbitration's viability, as a litigation alternative, for the entire legal community. *See* 341 F.3d at 998. Conversely, the Second Circuit suggests that the FAA only protects finality to the extent that it is desired by particular arbitrants. *See Hoeft*, 343 F.3d at 64, 65. For a fuller discussion of this distinction and its implication on the applicability of *Bonner Mall*'s extraordinary circumstances test to the heightened-review circuit split, see *infra* notes 281–292 and accompanying text.

[230] *See* 513 U.S. 18, 26–28, 29 (1994).

[231] *Id.* at 20.

tion" to the Bankruptcy Code's absolute priority rule.[232] Because the settlement agreement foreclosed the Court's review of the exception, the petitioner argued that the Ninth Circuit's judgment should be vacated.[233] A unanimous Court decided to apply the "extraordinary circumstances test" to contractual vacatur requests.[234] The test was crafted in accordance with the exceptional remedy of vacatur, which not only allows for future relitigation, but also abrogates precedent.[235] The standard required courts to balance (1) the parties' relative fault in causing the case to become moot, and (2) the public interest in judicial integrity.[236]

Turning to the first prong of the test, the Court held that when a party voluntarily enters a settlement agreement with the foreknowledge that the agreement will render a judgment unreviewable, such party is at fault for causing mootness.[237] Although this complicity placed a heavy burden on the petitioner, it could be overcome if vacatur was in the public interest.[238] The Court reasoned that vacatur by settlement implicated the public's interest in maintaining judicial integrity.[239] Because the entire legal community relies on precedent and orderly judicial procedure in structuring its affairs, the Court was unwilling to grant private litigants a property right in precedent.[240] The Court implied that it would be implausible to uphold vacatur by contract on fairness grounds because the parties to a settlement agreement could have forgone settlement and obtained thorough judicial review.[241] Finally, the Court extended its holding to settlement agree-

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[232] *Id.* at 20 & n.1.

[233] *See id.* at 26.

[234] *See id.* 26–27, 29. The Court stated that vacatur was an "extraordinary remedy" that required an analysis of the parties' fault in causing mootness and the public interest in maintaining judicial integrity. *See id.* at 26–27.

[235] *See Bonner Mall*, 513 U.S. at 22–23, 26 (citing United States v. Musingwear, Inc., 340 U.S. 36, 40 (1950)).

[236] *See id.* at 26–27. The Court also analyzed the claim that contractual vacatur would advance the public's interest in fostering judicial economy through settlement. *Id.* at 27–28. The Court implied that this policy justification was outside the rubric of the extraordinary circumstances test because, absent an empirical test, it was impossible to determine whether a contractual vacatur rule would serve to preclude litigation. *See id.* Indeed, the Court opined that the ready availability of contractual vacatur relief could deter settlement at the district court level. *Id.* at 28.

[237] *Id.* at 25–26.

[238] *See id.* at 26.

[239] *Id.*

[240] *See Bonner Mall*, 513 U.S. at 26.

[241] *See id.* at 25, 27.

ments that expressly required vacatur.[242] Because this factual distinction would not change the voluntary character of the settlement or vacatur's affect on judicial integrity, it would not qualify as an extraordinary circumstance.[243]

Although *Bonner Mall*'s "extraordinary circumstances test" applies explicitly to vacating precedent, at least two federal circuit courts of appeals have employed a similar analysis when considering motions to vacate confirmed arbitral awards.[244] In 1983, in *Merit Insurance Co. v. Leatherby Insurance Co.*, the Seventh Circuit Court of Appeals held that equitable vacatur of a confirmed award required not only a showing that an arbitrator had breached ethical guidelines, which were incorporated by reference in the arbitration agreement, but that this breach created the substantial danger that a court would confirm an unjust result.[245] The parties in *Merit* agreed to arbitrate pursuant to the rules of the American Arbitration Association (the "AAA").[246] Accordingly, the prospective arbitrators were required to disclose any relationships that might affect their impartiality.[247] One month after the arbitration award was confirmed and eighteen months after it was rendered, the appellee uncovered evidence that an arbitrator had a prior professional relationship with appellant's president.[248] Based on these facts, the district court vacated its decision confirming the award under Rule 60(b)(6) of the Federal Rules of Civil Procedure, which allows a final judgment to be vacated "for any reason justifying relief from the judgment."[249] On review, the Seventh Circuit considered (1) the relative fault of the parties, (2) the purposes of the FAA, and (3) the public interest in protecting the finality of arbitration.[250]

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[242] *See id.* at 29.

[243] *See id.*

[244] *See* LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334, 1338, 1339 & n.12 (9th Cir. 1986); Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 682–83 (7th Cir. 1983). In *LaFarge*, the appellant moved to vacate a confirmed arbitral award pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, which allows a final judgment to be vacated in the interests of justice. 791 F.2d at 1338. The appellant argued that the district court's refusal to consider evidence of arbitral fraud, which was uncovered after the confirmation, entitled it to relief. *Id.* at 1338, 1339. The Ninth Circuit Court of Appeals reasoned that such relief was only warranted in extraordinary circumstances, which did not include fraud or newly discovered evidence. *See id.*

[245] 714 F.2d at 682–83.

[246] *Id.* at 676.

[247] *Id.* at 678.

[248] *Id.* at 677.

[249] *Id.* at 676, 682.

[250] *See Merit*, 714 F.2d at 682–83.

First, the court emphasized that the decision to arbitrate was voluntary.[251] The appellant's uncoerced choice to authorize a panel of industry experts to decide the merits of its claim was coextensive with a commitment to forgo judicial resolution.[252] The court noted that the parties chose to arbitrate before experts because they were familiar with industry norms; however, because experts are also more likely to be biased than a federal judge, this choice entailed a tradeoff between impartiality and expertise.[253] Therefore, because the appellant freely accepted the arbitral bargain, it assumed the risk of arbitral bias.[254]

The *Merit* court next considered whether the arbitrator's violation of the contract's ethical guidelines required vacatur under section 10 of the FAA.[255] The court concluded that, standing alone, these rules did not require the federal courts to do anything because they did not have the force of law.[256] Indeed, the purposes of the rules and FAA vacatur standards were diametrically opposed.[257] The AAA adopted ethical standards to attract customers with a particular form of alternative dispute resolution.[258] Conversely, the court reasoned that Congress intended the FAA's vacatur standards to make arbitration *effective* not *attractive*.[259] The FAA accomplished this purpose through the federal court's coercive confirmation authority, which gives arbitration awards the force of law.[260] Parties are encouraged to arbitrate because judicial intervention under the FAA ensures the basic fairness of the arbitral process without excessive judicial meddling.[261] Nevertheless, encouraging arbitration was not coextensive with lowering the threshold for judicial review of awards in accordance with parties' arbitral procedures; thus, a party could obtain vacatur of an award only if it could bring itself within the FAA or some other federal rule.[262]

Finally, the Seventh Circuit held that the district court had abused its discretion in equitably vacating the award pursuant to Fed-

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[251] *See id.* at 679.
[252] *See id.*
[253] *See id.*
[254] *See id.*
[255] *Merit*, 714 F.2d at 680–81.
[256] *Id.*
[257] *See id.* at 681.
[258] *Id.*
[259] *See id.*
[260] *See Merit*, 714 F.2d at 681.
[261] *See id.*
[262] *See id.*

eral Rule of Civil Procedure 60(b)(6).[263] Focusing on the lapse of eighteen months since the arbitral award was rendered, the court noted that equitable vacatur was an extraordinary remedy because it undermined society's interest in finality.[264] Even if the arbitrator violated the AAA's ethical standards, the court reversed the vacatur because confirmation was not substantially unjust.[265] The court concluded that the appellant implicitly agreed to accept the decision of the arbitrator because it made no inquiries concerning impartiality before arbitrating a $10 million dispute.[266] Thus, the court reasoned that the vacatur motion was merely a tactical response to a poor arbitral outcome.[267] To affirm vacatur in these circumstances would only serve to undermine the finality of arbitration because it would encourage all disappointed arbitrants to engage in expensive collateral attacks.[268] This, in turn, would undermine the FAA's purpose of making arbitration an effective alternative to judicial dispute resolution.[269] Finally, the court found the appellant's request wholly inequitable because it would permit parties to require courts, which could have resolved their dispute in the first instance, to undo the results of a voluntary decision to opt out of litigation.[270]

IV. Analysis: History, Text, Structure, and Precedent Support Application of *Bonner Mall*'s Extraordinary Circumstances Test to Heightened Standard of Review Clauses

The federal circuit courts of appeals continue to struggle over whether to enforce heightened standard of review clauses in arbitral agreements.[271] Prior judicial attempts to articulate a coherent, uniform analytical framework applicable to heightened-review clauses are unlikely to foster a consensus either because they are based upon a close reading of ambiguous statutory text or an interpretation of an

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[263] *See id.* at 676, 683.

[264] *See id.* at 682.

[265] *See Merit*, 714 F.2d at 682–83.

[266] *See id.* at 683.

[267] *See id.*

[268] *See id.*

[269] *See id.*

[270] *Merit*, 714 F.2d at 683.

[271] *Compare, e.g.*, Action Indus., Inc. v. United States Fid. & Guar. Co., 358 F.3d 337, 340–41 & n.10 (5th Cir. 2004) (holding that U.S. Supreme Court precedents require enforcement of heightened-review clauses), *with* Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 994 (9th Cir. 2003) (concluding that enforcement is unconstitutional).

amorphous pro-arbitration policy.[272] As several courts and commentators have noted, any successful uniform analytical framework must maintain an adequate balance between the FAA's preference for private ordering and judicial integrity.[273] Accordingly, because the U.S. Supreme Court, in 1994, in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, established an analytical framework for evaluating parties' contractual requests for judicial action, this Part proposes that federal courts apply *Bonner Mall*'s extraordinary circumstances test when determining whether to enforce heightened-review clauses.[274] The Seventh Circuit Court of Appeals anticipated this Part's proposal and applied a test similar to the extraordinary circumstances test in 1983, in *Merit Insurance Co. v. Leatherby Insurance Co.*, to reject a vacatur request predicated upon an arbitrator's violation of an arbitration agreement's procedural rules.[275]

To establish *Bonner Mall*'s applicability to the heightened-review circuit split, Part IV.A analyzes the pro- and anti-heightened-review conceptions of arbitral finality and contends that the pro-heightened-review position is incompatible with the history of arbitral awards, the FAA's text, structure, legislative history, and the precedents interpreting the FAA, because enforcing heightened-review clauses weakens the viability of arbitration as a mode of alternative dispute resolution available to the entire legal community.[276] Building upon Part IV.A's statutory and case law analysis, Part IV.B argues that *Bonner Mall*'s extraordinary circumstances test should apply to heightened-review litigants' vacatur requests because such requests are functionally analogous to the attempt to vacate unfavorable precedent pursuant to a settlement agreement.[277] Next, Part IV.C anticipates the contention that applying *Bonner Mall*'s extraordinary circumstances test to heightened-review vacatur requests is incompatible with pro-arbitration pol-

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[272] *See, e.g.*, Cole, *supra* note 8, at 1258.

[273] *See, e.g.*, Schoch v. Infousa, Inc., 341 F.3d 785, 789 & n.3 (8th Cir. 2003); Cole, *supra* note 8, at 1259; Goldman, *supra* note 8, at 185–86; van Ginkel, *supra* note 8, at 198.

[274] *See* U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 26–27, 29 (1994); *see also* Hoeft v. MVL Group, Inc., 343 F.3d 57, 64, 65 (2d Cir. 2003) (holding that under *Bonner Mall*, parties could not contract for *decreased* review of arbitral award, but reasoning that *Bonner Mall*'s holding might be inapposite in the *heightened*-review context); Cole, *supra* note 8, at 1216–17, 1259–60 (reasoning that concerns of devaluation of precedent and collateral attack are not readily present in the arbitral context and thus, because parties are merely asking court to apply standards of review, court could grant request without compromising institutional integrity).

[275] *See* 714 F.2d 673, 682–83 (7th Cir. 1983).

[276] *See infra* notes 281–324 and accompanying text.

[277] *See infra* notes 325–342 and accompanying text.

icy because it contravenes the express terms of arbitration agreements.[278] In response, this Part concludes that the extraordinary circumstances test conforms to the U.S. Supreme Court's holding in 1995, in *First Options of Chicago, Inc. v. Kaplan* because it protects arbitration's primary institutional advantage—finality—and because arbitration's inherent flexibility necessitates the conclusion than any inequity under *Bonner Mall*'s analytical rubric is attributable solely to the fault of the contracting parties.[279] Finally, Part IV.D summarizes the foregoing analysis.[280]

A. *The Extraordinary Circumstances Test Ensures the Preservation of the Final and Binding Arbitration that the FAA Was Intended to Protect*

The Second Circuit Court of Appeals' suggestion in 2003, in *Hoeft v. MVL Group, Inc.*, that *Bonner Mall*'s extraordinary circumstances might be inapplicable to heightened-review clauses is flawed.[281] Without further analysis, the court explained that there was a qualitative difference between arbitration agreements that narrowed judicial review and those that expanded judicial review.[282] Notably, just five days before *Hoeft* was decided, the Ninth Circuit Court of Appeals, in *Kyocera Corp. v. Prudential-Bache Trade Services Co.*, registered implicit disagreement with the Second Circuit's distinction.[283] The *Kyocera* court explained that if the FAA was silent on parties' ability to obtain contractual review, it might be less pernicious for courts to enforce a decreased-review clause.[284]

The Second and Ninth Circuit's positions highlight the importance of finality in the heightened-review debate.[285] The Second Circuit seems unwilling to foreclose the validity of heightened-review clauses because courts could employ the clauses to render a particular equitable result, without abdicating their duty to review arbitral awards.[286] This is precisely the position of pro-heightened-review jurisprudence, which holds that it is inequitable to preclude heightened review if the parties have grafted it onto their arbitral process to en-

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[278] *See infra* notes 344–347 and accompanying text.
[279] *See infra* notes 348–363 and accompanying text.
[280] *See infra* notes 364–379 and accompanying text.
[281] *See Hoeft*, 343 F.3d at 64, 65. For a fuller review of this statement, see *supra* note 229.
[282] *Hoeft*, 343 F.3d at 64.
[283] *See Kyocera*, 341 F.3d at 998–99 n.16.
[284] *Id.*
[285] *See Hoeft*, 343 F.3d at 64; *Kyocera*, 341 F.3d at 998.
[286] *See Hoeft*, 343 F.3d at 64.

sure a legally or factually accurate result.[287] Indeed, in 2001, in *Roadway Package System, Inc. v. Kayser*, the Third Circuit Court of Appeals enforced a heightened-review clause to ensure that it would not frustrate the parties' mutual request for a more circumspect legal analysis.[288] In contrast, the Ninth Circuit, like other anti-heightened-review courts, was unconcerned with doing justice to particular arbitrants, and it reasoned that any benefit gained from particular equitable results would be vastly outweighed by diminished judicial integrity and the evisceration of arbitral finality.[289] Similarly, in 2001, in *Bowen v. Amoco Pipeline Co.*, the Tenth Circuit Court of Appeals refused to enforce a heightened-review clause because expanded judicial review threatened to undermine the finality of arbitral awards and, concomitantly, the viability of arbitration.[290] Like the *Kyocera* and *Bowen* courts, in *Merit*, the Seventh Circuit held that the FAA granted courts the authority to make arbitration an effective litigation alternative through award enforcement, but that the Act's pro-arbitration policy was not coextensive with an assurance that parties could contractually conscript courts to void a poor arbitral result.[291] Because the FAA's history, text, structure, legislative history, and precedent strongly support anti-heightened-review courts' preference for arbitral viability as opposed to pro-heightened-review courts' protection of party autonomy, the Second Circuit's suggestion that *Bonner Mall*'s extraordinary circumstances is inapplicable to heightened-review clauses is of no moment.[292]

1. History, Text, Structure, Legislative History, and Precedent Support the Seventh, Ninth, and Tenth Circuits' Finality Analysis

The FAA's text, structure, legislative history, and the precedents interpreting the FAA, illustrate that the anti-heightened-review courts' finality analysis was correct.[293] After the U.S. Supreme Court decided

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[287] *See, e.g.*, Hughes Training Co. v. Cook, 254 F.3d 588, 593, 594 (5th Cir. 2001); Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 996–97 (5th Cir. 1995).

[288] *See* 257 F.3d 287, 296–97 (3d Cir. 2001); *see also Action Indus.*, 358 F.3d at 340–41 (reasoning that consensual nature of arbitration mandates enforcement of heightened-review clauses).

[289] *See Kyocera*, 341 F.3d at 998, 1000.

[290] 254 F.3d 925, 935 (10th Cir. 2001).

[291] *See Merit*, 714 F.2d at 681, 683.

[292] *See Hoeft*, 343 F.3d at 64; *Kyocera*, 341 F.3d at 998; *Bowen*, 254 F.3d at 935; *Merit*, 714 F.2d at 681, 683.

[293] *See* 9 U.S.C. §§ 2–5, 9–10 (2000); Southland Corp. v. Keating, 465 U.S. 1, 7 (1984); Burchell v. Marsh, 58 U.S. (17 How.) 344, 349 (1854); MACNEIL, *supra* note 51, at 33; MACNEIL ET AL, *supra* note 14, §§ 8.1, 9.3 n.16.

Burchell v. Marsh in 1854, it was well settled that courts would best encourage arbitration if they considered awards as final judgments and reviewed final awards narrowly for egregious procedural irregularities.[294] Like the Seventh, Ninth, and Tenth Circuits, the *Burchell* Court was not concerned with doing justice to particular arbitrants; indeed, the Court refused to review an award for legal error because it believed that the practice could lead only to increased litigation, which would discourage future parties from resorting to arbitration.[295]

As the U.S. Supreme Court has suggested, the text and structure of the FAA ensure the viability of arbitration by limiting judicial intermeddling in the arbitral process.[296] Sections 2 through 5 of the FAA assure parties that the courts will enforce their arbitral procedures.[297] Once those procedures have rendered a final award, however, sections 9 and 10 mandate that the award will be set aside only because of egregious procedural defects in the arbitral process.[298] Accordingly, the FAA's text ensures that parties get what they bargain for, namely, the decision of an arbitrator after a full and fair hearing.[299] Because courts have recognized that strict adherence to the text of sections 9 and 10 of the FAA allows for some particularly egregious results, they have also crafted extremely narrow non-statutory vacatur standards.[300] Like their statutory counterparts, however, these non-

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[294] *See Burchell*, 58 U.S. at 349–50; Karthaus v. Ylias y Ferrer, 26 U.S. (1 Pet.) 222, 226–27, 229 (1828); White Star Mining Co. v. Hultberg, 77 N.E. 327, 335–36 (Ill. 1906); *see also* Red Cross Line v. Atl. Fruit Co., 264 U.S. 109, 121 (1924) (deciding, one year before FAA enacted, that under *Burchell* and *Karthaus*, federal courts could enforce arbitral awards).

[295] *Compare Burchell*, 58 U.S. at 349 (holding that viability of arbitration depended on limited vacatur grounds), *with Kyocera*, 341 F.3d at 998 (stating that broadening judicial review of arbitral awards could limit parties' ability to trade more circumspect decision of a federal court for more efficient arbitral determination), *Bowen*, 254 F.3d at 935 (reasoning that heightened review would dilute finality and thus, undermine the viability of arbitration), *and Merit*, 714 F.2d at 683 (holding that expanded vacatur grounds would undermine the finality of arbitration and thus, contravene FAA's intent).

[296] *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942, 943 (1995); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland J. Stanford Junior Univ., 489 U.S. 468, 474–75 (1989); *see also* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57–58 (1995) (quoting *Volt* and reasoning that under FAA, courts must enforce awards obtained pursuant to rules set forth in *arbitral* agreements). *But see Action Indus.*, 358 F.3d at 341 n.10 (deciding that *Mastrobuono* stands for the broader proposition that parties may contract around *judicial* procedural rules set forth in FAA).

[297] *See* 9 U.S.C. §§ 2–5.

[298] *See id.* §§ 9–10; *Kaplan*, 514 U.S. at 942.

[299] *See, e.g.*, *Kaplan*, 514 U.S. at 942–43.

[300] *See, e.g.*, Prudential-Bache Secs., Inc. v. Tanner, 72 F.3d 234, 241 (1st Cir. 1995); Lifecare Int'l v. CD Med., Inc., 68 F.3d 429, 435 (11th Cir. 1995); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933–34 (2d Cir. 1986).

statutory standards of review ensure that the finality of the arbitral bargain is not jettisoned because of an arbitrator's legal or factual errors.[301] Thus, because neither statutory nor non-statutory standards of review permit a substantive review of the factual or legal dispositions of the arbitrator, these strictly limited standards of review prevent judicial interference with arbitral finality in all but extreme circumstances.[302]

Limited judicial review under the FAA's enforcement scheme is not accidental.[303] Congress decided to codify the vacatur provisions of the ABA's Arbitration Statute, which rejected the English and Illinois arbitration statutes' overlapping division of labor between courts and arbitrators.[304] Under the English and Illinois statutes, an arbitrator's legal conclusions were never final because a court, upon motion of either arbitrant, could overrule them.[305] The FAA's framers found such excessive judicial interference inimical to the promotion of arbitration and thus, explicitly codified the ABA statute's narrow vacatur grounds.[306] The preference for narrow vacatur standards reflects a desire to distinguish clearly between arbitrators and courts.[307] Congress enacted an enforcement scheme under which arbitrators were primary decisionmakers and courts were granted coercive authority to implement final results of the arbitral bargain and to prevent egregious procedural errors.[308]

Finally, even the U.S. Supreme Court's decisions in 1989 and 1995, in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* and *Mastrobuono v. Shearson Lehman Hutton, Inc.*, which pro-heightened-review courts rely heavily upon, implicitly support the anti-heightened-review courts' finality approach.[309] The *Volt* Court upheld the enforcement of *arbitral* procedures under section 4 of the FAA, which contravened the FAA's pro-arbitration policy by

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[301] *See* Advest, Inc. v. McCarthy, 914 F.2d 6, 10 (1st Cir. 1990).

[302] *Kyocera*, 341 F.3d at 997–98.

[303] *See* Schmitz, *supra* note 51, at 149–50.

[304] MACNEIL, *supra* note 51, at 31–32, 33, 35; MACNEIL ET AL., *supra* note 14, §§ 8.1, 9.3 n.16.

[305] *See* MACNEIL, *supra* note 51, at 33; *see also* Schmitz, *supra* note 51, at 150–51 (arguing that FAA drafters crafted section 10 to avoid divesting arbitrators of ultimate decisionmaking authority).

[306] *See* MACNEIL, *supra* note 51, at 33; MACNEIL ET AL., *supra* note 14, §§ 8.1, 9.3 n.16.

[307] *See Kaplan*, 514 U.S. at 942–43; *Kyocera*, 341 F.3d at 997–98, 1000; *Bowen*, 254 F.3d at 935.

[308] *See Merit*, 714 F.2d at 681; *see also* Schmitz, *supra* note 51, at 150–51 (arguing that FAA's framers intended to preserve arbitral finality by sharply distinguishing arbitral and judicial authority).

[309] *See Mastrobuono*, 514 U.S. at 57–58; *Volt*, 489 U.S. at 476 & n.5; *Bowen*, 254 F.3d at 935.

spawning increased litigation, but these procedures were derived from a state arbitration law that was patently designed to encourage arbitration.[310] *Mastrobuono* merely affirms the validity of *Volt* in the context of confirming arbitral awards; it holds that when parties' arbitral procedures yield a final award, courts will enforce the results of the arbitral process.[311] Moreover, in re-affirming *Volt*, the *Mastrobuono* Court emphasized the *Volt* Court's finding that the arbitral procedures it upheld were manifestly designed to encourage parties' resort to arbitration.[312] Thus, far from confirming the Fifth Circuit's conclusion in 2004, in *Action Industries, Inc. v. United States Fidelity & Guaranty Co.*, that *Mastrobuono* implied that parties could contractually alter a federal *court's* vacatur analysis under the FAA, a close reading of *Mastrobuono* confirms that its holding was limited to enforcing the results of an *arbitral* process that did not contravene the FAA's pro-arbitration policy.[313] Indeed, as the Tenth Circuit reasoned in *Bowen*, *Volt* did not even imply the thoroughly novel proposition that the FAA supports contracting for *judicial* review.[314] Therefore, because the *Mastrobuono* Court's analysis relied on the fact that the agreement at issue accorded with *Volt* because its arbitral procedure did not contravene the FAA's pro-arbitration policy, it seems unlikely the Court would read *Volt* to give effect to heightened-review clauses, which seek to mandate *judicial* procedures and undermine arbitration's viability through increased litigation.[315] Absent an empirical study, it is impossible to determine whether enforcing heightened-review clauses would lead to increased litigation costs and judicial inefficiency.[316] The facts in *Kyocera* and *Merit*, however, suggest that allowing heightened-review litigants to attack final arbitral awards collaterally would lead many dis-

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[310] *See Volt*, 489 U.S. at 476 & n.5, 479.

[311] *See Mastrobuono*, 514 U.S. at 58, 64.

[312] *See id.* at 57; *Volt*, 489 U.S. at 476 & n.5.

[313] *Compare Mastrobuono*, 514 U.S. at 57–58 (limiting *Volt* to requiring enforcement of arbitral procedures that encourage use of arbitration), *with Action Indus.*, 358 F.3d at 341 n.10 (concluding that *Mastrobuono*'s holding implicitly overrules courts' longstanding practice of applying FAA's limited vacatur grounds).

[314] *See Bowen*, 254 F.3d at 934–35.

[315] *See Mastrobuono*, 514 U.S. at 57–58; *Kyocera*, 341 F.3d at 998; *Bowen*, 254 F.3d at 935; *see also Kaplan*, 514 U.S. at 942 (reasoning that under FAA, party relinquishes practical value of right to judicial review and is only entitled to extremely limited review mandated by FAA and manifest disregard for the law standard).

[316] *See Merit*, 714 F.2d at 682–83; *see also Kyocera*, 341 F.3d at 991–994 (setting forth lengthy course of litigation arising out of heightened-review clause). *But see* Cole, *supra* note 8, at 1262 (rejecting judicial efficiency argument against heightened-review clauses absent empirical study).

appointed arbitrants to attempt to void poor arbitral results through lengthy litigation.[317]

Neither the FAA's history, text, intent, structure, nor its precedent, support pro-heightened-review courts' conclusion that arbitral finality under the FAA is a creature of contract.[318] Indeed, the assumption that arbitral awards are final and binding informs the division of arbitral and judicial labor under the FAA.[319] Furthermore, the concept of finality thoroughly pervades the Act and is an integral part of its pro-arbitration policy.[320] Finality undergirds the FAA's promotion of arbitration in lieu of litigation because without the assurance of finality, few prospective arbitrants would be willing to waste any resources on an arbitration that was merely a prelude to litigation.[321] Given these considerations, the Second Circuit's reasoning that heightened-review clauses might be acceptable under the FAA is untenable.[322] Although the FAA's liberal encouragement of varying arbitral procedures is party centered, its strict assurance of finality implies its intent to preserve arbitration as a viable litigation alternative for the entire legal community.[323] Accordingly, the Second Circuit's purported distinction between narrow- and heightened-review clauses should not prevent courts from adopting *Bonner Mall*'s extraordinary circumstances test.[324]

B. Bonner Mall's *Compatibility with Arbitral Practice and Its Superiority to Previous Attempts at a Uniform Standard of Review*

The similarity between the factual scenarios present in cases comprising the heightened-review circuit split and the facts at issue in

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[317] *See Merit*, 714 F.2d at 683.

[318] *See Kyocera*, 341 F.3d at 997–1000; *Bowen*, 254 F.3d at 934–37; Cole, *supra* note 8, at 1258.

[319] *See Kaplan*, 514 U.S. at 942–43. *Compare* 9 U.S.C. § 2 (2000) (requiring that arbitral agreements be expressly enforced), *with* 9 U.S.C. § 10 (mandating particular standards of review after agreement has yielded arbitral award).

[320] *See Kyocera*, 341 F.3d at 998; *Bowen*, 254 F.3d at 935.

[321] *See, e.g., Bowen*, 254 F.3d at 935, 936 n.7; *Merit*, 714 F.2d at 683.

[322] *Compare Kaplan*, 514 U.S. at 942 (reasoning that agreement to arbitrate divests court of authority to decide merits of dispute), *Kyocera*, 341 F.3d at 998 (concluding that FAA allows parties to opt for final arbitral decisions and not to jeopardize the viability of arbitration with heightened-review clauses), *and Bowen*, 254 F.3d at 935 (citing *Kaplan* and reasoning that viability of arbitration requires non-enforcement of techniques that tend to undermine finality of awards), *with Hoeft*, 343 F.3d at 64 (assuming, but not deciding, that equitable considerations would support enforcement of arbitral awards).

[323] *See Bowen*, 254 F.3d at 935.

[324] *See Hoeft*, 343 F.3d at 64.

Bonner Mall further suggests the applicability of the extraordinary circumstances test to heightened-review clauses.[325] The parties in *Bonner Mall* decided to forgo litigation and settled their dispute privately.[326] After the settlement was final, the petitioner was displeased with the results of settlement—the continued viability of unfavorable lower court precedents—and sought to enlist the Court to vacate the unfavorable precedents and thus, to perfect its contractual expectations.[327] Similarly, heightened-review litigants choose to forgo litigation, obtain a result—an unfavorable arbitration award—that they are unhappy with, and claim that contractual fairness requires a federal court to conform its processes to those set forth in a private arbitral agreement.[328]

Factually, the scenario in *Bonner Mall* is distinguishable from the heightened-review cases because heightened-review litigants ask a court to apply a standard of review, not to overturn precedent.[329] Nevertheless, this distinction is inconsequential, because as the Second Circuit reasoned in *Hoeft*, the standards of review that apply to an arbitration award are as valuable to the legal community as any precedent.[330] Indeed, ensuring the ability of parties to opt for final arbitration under the FAA's limited review scheme is like ensuring that they can rely on precedent when they choose to litigate, because the preservation of limited review and precedent facilitates expeditious resolution of disputes.[331] Therefore, courts should extend *Bonner Mall*'s extraordinary circumstances test to the heightened-review context; *Bonner Mall* teaches that courts should conform their processes to contractual requests only after balancing the relative fault of the parties with the public interest in maintaining judicial integrity.[332]

Relative fault is high in the heightened-review context.[333] Like all FAA litigants, heightened-review litigants knowingly forgo the circumspect legal and factual analyses of the federal courts, and their atten-

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[325] *Compare, e.g.*, *Bonner Mall*, 513 U.S. at 26 (setting forth petitioner's unitary request for contractual vacatur), *with Bowen*, 254 F.3d at 933 (stating that one party to arbitration agreement urged court to undertake review not sanctioned by statute or precedent).

[326] *Bonner Mall*, 513 U.S. at 20.

[327] *See id.* at 26.

[328] *See, e.g.*, *Kyocera*, 341 F.3d at 989–91.

[329] *Compare, e.g.*, *Bonner Mall*, 513 U.S. at 20 (describing party's request for contractual vacatur of precedent), *with Bowen*, 254 F.3d at 930 (setting forth party's request for contractual standard of review).

[330] *See*, 343 F.3d at 65.

[331] *See Bowen*, 254 F.3d at 935.

[332] *See Bonner Mall*, 513 U.S. at 26–27, 29.

[333] *See, e.g.*, UHC Mgmt. Co. v. Computer Scis. Corp., 148 F.3d 992, 998 (8th Cir. 1998).

dant protective processes, in favor of efficient arbitral resolution.[334] Under *Bonner Mall*, the uncoerced choice to opt into arbitration and its concomitant statutory scheme means that parties are at fault for failing to comprehend the foreseeable result of their decision—limited vacatur review of arbitral awards.[335] Quite simply, parties' decisions to include heightened-review clauses in their arbitration agreements do not present the exceptional vagaries of circumstance that justify the augmentation of judicial procedures that uniformly apply to all citizens.[336]

The enforcement of heightened-review clauses also fails to accord with the public's interest in protecting judicial integrity and encouraging arbitration.[337] Under *Bonner Mall*, the interest in promoting settlement, presumably even arbitral settlement, can never justify the abdication of well settled judicial processes.[338] The public expects the judiciary to act as a principled decisionmaker; when it does not, the independence of the judiciary and the value of precedent is called into question.[339] Furthermore, as the *Kyocera*, *Bowen*, and *Merit* courts noted, the public is entitled to expect that courts, pursuant to congressional command, will protect the finality of awards under the FAA.[340] Failure to do so undermines arbitral finality and hinders parties' ability to effectively opt out of litigation.[341] Accordingly, both the public interest in judicial integrity and in promoting arbitration as a means of extra-judicial settlement militate strongly in favor of using *Bonner Mall*'s extraordinary circumstances test to invalidate heightened-review clauses.[342]

C. *Overcoming Scholarly Objections to* Bonner Mall *Through an Application of* Kaplan *and Pro-Arbitration Policy*

The managerial litigation and arbitral appellate models each reject the extraordinary circumstances test in favor of approaches that purportedly blend pro-arbitration policy with judicial integrity.[343] Both models assume that the FAA's pro-arbitration policy requires courts to

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[334] *See id.*

[335] *See Bonner Mall*, 513 U.S. at 26; *Merit*, 714 F.2d at 683.

[336] *See Bonner Mall*, 513 U.S. at 26–27; *Merit*, 714 F.2d at 681.

[337] *See, e.g.*, *Bowen*, 254 F.3d at 934.

[338] *See Bonner Mall*, 513 U.S. at 27–28.

[339] *See id.* at 26–27.

[340] *See Kyocera*, 341 F.3d at 998; *Bowen*, 254 F.3d at 935; *Merit*, 714 F.2d at 683.

[341] *See Kyocera*, 341 F.3d at 998; *Bowen*, 254 F.3d at 935; *Merit*, 714 F.2d at 683.

[342] *See Bonner Mall*, 513 U.S. at 26–27, 29; *Kyocera*, 341 F.3d at 997–1000.

[343] *See* Cole, *supra* note 8, at 1260, 1263; van Ginkel, *supra* note 8, at 188–90, 198.

acquiesce to heightened-review clauses.[344] The managerial litigation model, however, attempts to preserve judicial integrity by requiring heightened-review litigants to provide courts with a sufficient arbitral record and by refusing to enforce heightened-review clauses that do not mandate a commonly applied standard of review.[345] Conversely, the arbitral appellate model does not require a record or a particular standard of review because heightened-review litigants' consent to courts' review of "arbitral appeals" is sufficient to enforce heightened-review clauses under the FAA's broad pro-arbitration policy.[346] Ultimately these approaches are flawed for two reasons: (1) they ignore the U.S. Supreme Court's FAA precedent, which establishes that standards of review should be crafted in accordance with the institutional advantages of the primary decisionmakers, and (2) they contravene pro-arbitration policy by encouraging litigation.[347]

1. All Proposed Models Ignore the Primary Institutional Advantage of Arbitration—Finality

In 1995, in *Kaplan*, the U.S. Supreme Court struck down an Eleventh Circuit Court of Appeals rule, under which an appellate court would review a decision confirming an arbitral award for abuse of discretion and a vacatur decision de novo.[348] Like the managerial litigation and arbitral appellate models, the Eleventh Circuit reasoned that standards of review for arbitral awards should be predicated upon the FAA's pro-arbitration policy.[349] *Kaplan* teaches, however, that pro-arbitration policy is not an adequate basis upon which to base a standard of review; the proper inquiry is not whether a standard of review is likely to produce a pro-arbitration result, but whether it is compatible with the institutional advantages of the primary decisionmaker.[350]

There are many advantages to arbitration—speed, flexibility, and privacy—but none of these would be possible without the assurance that arbitral decisions are final.[351] Indeed, the *Kaplan* Court noted that the very purpose of arbitration was final dispute resolution.[352]

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[344] *See* Cole, *supra* note 8, at 1260, 1263; van Ginkel, *supra* note 8, at 192.
[345] Cole, *supra* note 8, at 1260, 1263.
[346] van Ginkel, *supra* note 8, at 188–89, 192, 197–98.
[347] *Kaplan*, 514 U.S. at 947; *Bowen*, 254 F.3d at 935, 936 n.7; *Merit*, 714 F.2d at 683.
[348] 514 U.S. at 948.
[349] *See id.*; Cole, *supra* note 8, at 1258; van Ginkel, *supra* note 8, at 197–98.
[350] *See* 514 U.S. at 948.
[351] *See, e.g.*, *Bowen*, 254 F.3d at 935, 936 n.7.
[352] *See Kaplan*, 514 U.S. at 942–43.

The FAA's history, text, structure, legislative history, and the precedents interpreting the FAA bolster the Court's reasoning: each establishes that the FAA protects finality because there would be little incentive to opt for arbitration if a final award—the crux of the arbitral bargain—were open to a lengthy and expensive collateral attack in the federal courts.[353]

In addition, the contractual nature of arbitration illustrates that its primary institutional advantage is finality.[354] When parties select an arbitrator, they express their confidence in the arbitrator's ability to render a final and binding decision in those disputes submitted for decision.[355] As the Seventh Circuit noted in 1983, in *Merit*, when the parties have voluntarily selected the arbitrator and the complexity of the matter at issue, they have assumed the risk of finality.[356] Just as the U.S. Supreme Court reasoned in *Kaplan* that administrative agencies' legal interpretations are to be accorded deferential review because Congress has empowered them to make public law, so too should courts maintain the FAA's deference to arbitral awards to ensure that parties can reliably call upon arbitrators to make private law.[357] Therefore, because the extraordinary circumstances test accords with finality—the primary institutional advantage of arbitration—it should apply to heightened-review vacatur requests.[358]

2. Proposed Models Belie Their Pro-Arbitration Policy Claim

Despite the inability of the courts of appeals to articulate a consistent standard of review applicable to heightened-review clauses, there is widespread agreement that disappointed heightened-review litigants are not without recourse.[359] Even the Ninth Circuit's stringent textualist analysis would allow parties to contract for any number of intermediate arbitral appellate panels.[360] Although the FAA's pro-

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[353] *See, e.g.*, *Kyocera*, 341 F.3d at 997–98, 1000; *Merit*, 714 F.2d at 681.

[354] *See, e.g.*, *Merit*, 714 F.2d at 679, 683.

[355] *See id.*

[356] *See id.* at 683.

[357] *See* Cole, *supra* note 8, at 1260 (reasoning that courts apply arbitrary and capricious standard of review to administrative agencies' decisions to ensure minimal judicial interference in agency decision making). *Compare Kaplan*, 514 U.S. at 948 (holding that under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984), administrative agencies' legal authority triggers deferential review), *with Bowen*, 254 F.3d at 935 (reasoning that FAA vacatur review must be narrow so public can rely upon arbitral finality).

[358] *See Merit*, 714 F.2d at 682–83.

[359] *See Kyocera*, 341 F.3d at 994, 1000; *Bowen*, 254 F.3d at 936; *UHC*, 148 F.3d at 998.

[360] *See Kyocera*, 341 F.3d at 1000.

tection of arbitral finality is manifest, as *Volt* and *Mastrobuono* illustrate, the Act does not require that arbitration be conducted according to any one set of procedural rules.[361] Thus, if parties have sufficient reason to fear an egregious arbitral award, they can require that the arbitrator be well versed in the applicable law, or that a retired judge or lawyer hear appeals from arbitrators' decisions—that there are any number of possibilities for heightened review open to prospective arbitrants suggests that the heightened-review project is unnecessary and ill conceived.[362] Moreover, as the *Kyocera* court noted, any claim that heightened-review clauses further the FAA's pro-arbitration policy is belied by the clauses' tendency to produce vexatious litigation, which ultimately discourages parties from resorting to arbitration.[363]

D. *Putting It All Together: Finality, Relative Fault, Judicial Integrity, and Pro-Arbitration Policy Support the Applicability of* Bonner Mall*'s Extraordinary Circumstances Test to Heightened Standard of Review Clauses*

As the Eighth Circuit Court of Appeals stated in 2003, in *Schoch v. Infousa*, heightened-review clauses seek extravagant results—alteration of the FAA and the role of courts and arbitrators—without even the slightest hint of a congressional mandate and, at best, cryptic precedential support.[364] These requests pose a severe threat to the viability of arbitration and judicial integrity, which should be avoided through the application of *Bonner Mall*'s extraordinary circumstances test for four reasons.[365] First, the FAA protects arbitral finality, which is as valuable to the legal community as precedent.[366] Were courts to enforce heightened-review clauses, sophisticated actors would inevitably include them in arbitral agreements.[367] If this were allowed, disappointed arbitrants, like the Kyocera Corporation, predictably would engage in protracted litigation, which would only undermine the vi-

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[361] *See Mastrobuono*, 514 U.S. at 57–58; *Volt*, 489 U.S. at 479.

[362] *See Kyocera*, 341 F.3d at 1000; *see also Merit*, 714 F.2d at 683 (reasoning that parties' failure to conduct more circumspect review of arbitrator's credentials suggested that contractual vacatur request was mode of avoiding compliance with arbitral award).

[363] *See Kyocera*, 341 F.3d at 998, 1000; *see also Bowen*, 254 F.3d at 935 (reasoning that procedures that undermine finality of arbitral awards contradict pro-arbitration policy).

[364] *Schoch*, 341 F.3d at 789 & n.3.

[365] *See Bonner Mall*, 513 U.S. at 26–27, 29.

[366] *Compare Bonner Mall*, 513 U.S. at 26 (reasoning that precedent is valuable because it can be utilized by all citizens), *with Bowen*, 254 F.3d at 935 (reasoning that FAA's assurance of finality ensures continued viability of arbitration).

[367] *See Roadway*, 257 F.3d at 297.

ability of arbitration and increase litigation costs for all commercial actors.[368] Thus, arbitration's importance to the entire legal community implies that finality, its central tenet, should be protected under a stringent standard of review.[369]

The primary importance of finality leads to the second reason supporting the use of the extraordinary circumstances test—the functional similarity between vacatur by contract at issue in *Bonner Mall* and contractually mandated judicial review.[370] Both represent attempts to avoid the foreseeable outcome of a voluntary litigation avoidance strategy.[371] Moreover, parties' relative fault in forgoing litigation is compounded by asking the federal judiciary to disregard traditional jurisprudential norms merely to perfect contractual expectations, thereby severely undermining judicial integrity.[372] Indeed, a third consideration is that no pro-heightened-review proposals for a uniform standard of review accord with the U.S. Supreme Court's decision in *Kaplan*, which mandates an institutional advantage approach to crafting standards of review and rejects standards primarily crafted to coincide with the amorphous commands of pro-arbitration policy.[373] Because finality is the primary institutional advantage of arbitration, any standard of review tending to eviscerate finality contravenes the Court's holding in *Kaplan*.[374]

Finally, the extraordinary circumstances test poses no affront to fundamental fairness.[375] As the Second and Ninth Circuits held, in *Hoeft* and *Kyocera*, although arbitrants may craft arbitral procedures to suit their needs, they must take the FAA and the precedents interpreting it as they find them.[376] Under *Volt*, it is clear that despite the delays inherent in an intricate arbitral appellate process, the courts would

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[368] *See Kyocera*, 341 F.3d at 991–94; *see also Merit*, 714 F.2d at 682 (stating that confirmation was delayed for eighteen months because of contractual vacatur request).

[369] *See Bowen*, 254 F.3d at 935.

[370] *Compare, e.g., Bonner Mall*, 513 U.S. at 26–27 (holding that vacatur by settlement forces courts to abdicate judicial role), *with Hoeft*, 343 F.3d at 65 (reasoning that judicial standards of review are not property of private litigants), *and Schoch*, 341 F.3d at 789 n.3 (reasoning that contractual review amends the FAA and changes arbitral practice without statutory mandate).

[371] *See Hoeft*, 343 F.3d at 64 (citing *Bonner Mall*, 513 U.S. at 26).

[372] *See id.* at 64–65.

[373] *See Kaplan*, 514 U.S. at 948.

[374] *See id.*

[375] *See, e.g., Merit*, 714 F.2d at 679, 683; *see also UHC*, 154 F.3d at 998 (warning parties that the arbitral bargain is a choice to opt out of adjudication and judicial procedures).

[376] *See Hoeft*, 343 F.3d at 65–66 (distinguishing arbitral from judicial procedures); *Kyocera*, 341 F.3d at 1000.

enforce such an agreement according to its terms under sections 3 and 4 of the FAA.[377] There is no similar authority requiring the enforcement of contractual standards of judicial review; indeed, the great weight of authority militates strongly against extending this advantage to arbitrants.[378] Thus, courts need not step in to ensure an equitable review for which the parties could have contracted.[379]

Conclusion

The persistent circuit split over the enforceability of heightened standard of review clauses in arbitration agreements should be resolved through the application of the extraordinary circumstances test. The Second Circuit implicitly applied *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*'s extraordinary circumstances test in 2003, in *Hoeft v. MVL Group, Inc.*, to strike down a decreased standard of review clause. In 1994, in *Bonner Mall*, the U.S. Supreme Court employed this test to defeat a request to vacate lower court judgments pursuant to a settlement agreement. In addition, the Seventh Circuit Court of Appeals applied a similar test to defeat a request to vacate a confirmed arbitral award in accordance with the terms of an arbitration agreement. The Seventh, Ninth, and Tenth Circuit Courts of Appeals have held that allowing parties to attack an arbitration award pursuant to contract undermines arbitral finality and judicial integrity. The history of arbitral awards, and the FAA's text, structure, and legislative history, as well as the precedents interpreting the FAA, support the conclusion of these anti-heightened-review courts. Therefore, because the FAA's limited vacatur review is as important to the legal community as precedent, and because arbitrants can contract for arbitral appellate review, the courts should adopt *Bonner Mall*'s extraordinary circumstances test to establish a consistent analytical framework for rejecting heightened-review clauses. Adopting such a consistent course would alleviate confusion, increase bargaining efficiency, and preserve judicial integrity.

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[377] *See Volt*, 489 U.S. at 479; *see also Mastrobuono*, 513 U.S. at 57–58 (confirming *Volt*'s validity in section 10 proceedings).

[378] *See Kyocera*, 341 F.3d at 997–1000.

[379] *See id.* at 1000.